(14)

No. 00-152-CFX Title: Arthur S. Lujan, Labor Commissioner of California, et al., Petitioners
v.
G & G Fire Sprinklers, Inc.

Docketed:
July 28, 2000 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Jul 26 2000	Petition for writ of certiorari filed. (Response due August 27, 2000)
	Aug 25 2000	Motion of Port of Oakland, et al., for leave to file a brief as amici curiae filed.
	Aug 28 2000	Brief of respondent G & G Fire Sprinklers, Inc. in opposition filed.
	Sep 13 2000	DISTRIBUTED for Conference of October 6, 2000
	Sep 22 2000	Opposition of respondent to motion of Port of Oakland, et al., for leave to file a brief as amici curiae filed.
	Oct 10 2000	Motion of Port of Oakland, et al., for leave to file a brief as amici curiae GRANTED.
	Oct 10 2000	Petition GRANTED. SET FOR ARGUMENT February 26, 2001. **********
	Nov 6 2000	Order extending time to file brief of petitioner on the merits until December 4, 2000.
	Dec 4 2000	Joint appendix filed.
	Dec 4 2000	Joint appendix in two volumes.
	Dec 4 2000	Brief amici curiae of Port of Oakland and Fifty-four California Cities filed.
	Dec 4 2000	Motion of AFL-CIO for leave to file a brief as amicus curiae filed.
	Dec 4 2000	Brief of petitioners Arthur S. Lujan, et al. filed.
	Dec 4 2000	Brief amicus curiae of United States filed.
	Dec 19 2000	Order extending time to file respondent's brief on the merits to and including January 16, 2001.
	Dec 21 2000	Record filed.
	Jan 11 2001	Record filed.
	Jan 16 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jan 16 2001	Brief of respondent G & G Sprinklers, Inc. filed.
	Jan 17 2001	LODGING consisting of twenty bound copies of related documents submitted by counsel for the respondent.
	Jan 19 2001	CIRCULATED.
	Jan 22 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Jan 30 2001	Motion of petitioners for order to disregard certain matters outside the certified record and to strike respondent's lodging filed.
	Jan 31 2001	DISTRIBUTED. February 16, 2001 (page 48)
	Feb 8 2001	Opposition of respondent to motion of petitioners filed.
	Feb 14 2001	X Reply of petitioners to opposition of respondents to motion filed.

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No. 00-152-CFX

Entry	Date	Proceedings and Orders
	Feb 15 2001	Reply brief of petitioners Arthur Lujan, et al. filed.
	Feb 20 2001	Motion of petitioners for order to disregard certain matters outside the certified record and to strike respondent's lodging DENIED.
	Feb 26 2001	ARGUED.

FILED

No. _____ 00-152 JUL 26 2000

OFFICE OF THE CLERK

In The

Supreme Court of the United States

VICTORIA L. BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California,

Petitioners,

v.

G & G FIRE SPRINKLERS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether every instance of nonpayment to a private contractor by a state agency under a commercial contract constitutes a deprivation of due process.

2. Whether action within the absolute discretion of a private party constitutes state action.

3. Whether a third party not targeted by a statute suffers a denial of due process where the impact suffered is at most indirect.

4. Whether a contractor who has not alleged that he has an entitlement to public funds can state a claim for denial of due process based on the state's withholding of said funds.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Victoria L. Bradshaw[1], Lloyd W. Aubry, Jr.[2], Daniel Dellarocca, Roger Miller, Rosa Frazier, the Division of Labor Standards Enforcement, and the Department of Industrial Relations of the State of California (collectively, "State petitioners"), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled action on May 1, 2000.

OPINIONS BELOW

The judgment of the District Court, entered on November 9, 1995, is not reported but is reprinted in the appendix to this petition at A-85. The original opinion of the United States Court of Appeals for the Ninth Circuit is reported at 136 F.3d 587 (9th Cir. 1998) and is reprinted at A-52. The Ninth Circuit issued a subsequent order and amended opinion on September 10, 1998, reported at 156 F.3d 893 (9th Cir. 1998), and reprinted at A-16. On October 28, 1998, the Ninth Circuit issued an order denying the State's petition for rehearing, reprinted at A-88. Following the October 28, 1998 order denying the petition for rehearing, the State filed a Petition for Writ of Certiorari with this Court, which petition was granted on April 19, 1999 (526 U.S. 1061). This Court summarily vacated the judgment below and remanded the case for further consideration in light of *American Manufacturer's Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977 (1999). The Ninth Circuit issued yet a third opinion in this

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[1] Victoria L. Bradshaw was sued in her official capacity as Labor Commissioner of the State of California, a position she held when this litigation commenced. That position is presently held by Arthur S. Lujan.

[2] Lloyd W. Aubry, Jr., was sued in his official capacity as Director of the Department of Industrial Relations of the State of California, a position he held when this litigation commenced. Stephen Smith is the current Director.

case on February 23, 2000, reported at 204 F.3d 941 (9th Cir. 2000) and reprinted at A-1.

JURISDICTION

The Ninth Circuit issued its amended opinion and order on February 23, 2000. A timely petition for rehearing and rehearing en banc was denied on May 1, 2000. This petition for writ of certiorari is filed within ninety days of the denial of rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . "

42 U.S.C. § 1983 provides, in relevant part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The relevant California statutory provisions are reproduced in the appendix at A-77, and include California Labor Code §§ 1720, 1727, 1729, 1730, 1731, 1732, 1733, 1771, 1772, 1773, 1773.2, 1774, 1775, 1776, and 1813, and California Civil Code §§ 3103, 3181, 3184, 3186, 3210.

STATEMENT OF THE CASE

A. Facts

Petitioners are state officials and state agencies, *i.e.*, the Division of Labor Standards Enforcement (hereinafter "DLSE") and the Department of Industrial Relations,

responsible for the enforcement of California prevailing wage law. Respondent, G&G Fire Sprinklers, Inc. (hereinafter "G&G"), is a fire protection company that installs fire sprinkler systems. G&G both contracts directly with building owners or, as here, agrees to perform fire sprinkler installation solely as a subcontractor for a prime contractor. When the building owner is a California governmental entity, the construction work is a "public work."[3] On public works, the prime contractor agrees, in its contract with the governmental entity, that its construction workers, and those of the subcontractors whom it later selects to execute the contract, will be paid "prevailing wages."[4] (A-9, 10.)

This case arose when DLSE, pursuant to California Labor Code § 1727, having discovered after investigation prevailing wage law violations concerning three separate projects undertaken by G&G, a subcontractor, issued notices to withhold public works contract payments from the prime contractors on these projects. This investigation also disclosed a failure to provide DLSE with certified payroll records, an additional violation of law. Following issuance of the notices to withhold, the awarding bodies for each of the projects withheld money from the prime contractors. The prime contractors, in turn, withheld from G&G payments otherwise due under their subcontracts, as authorized by California Labor Code § 1729.

The obligation to pay prevailing wages on a public works project, and to provide DLSE with certified payroll

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[3] The term "public work" is defined at Cal. Labor Code § 1720 to include "construction, alteration, demolition, or repair work done under contract and paid in whole or in part out of public funds. . . . "

[4] Prevailing wages are fixed for each construction craft or classification in the locality in which the public work is performed. The procedure for determining prevailing wages is set out at Cal. Labor Code § 1773.

records, is founded upon both statute and contract. California Labor Code sections 1771 and 1774 require contractors and subcontractors to pay prevailing wages to all workers employed on a public works project. California Labor Code section 1776(a) requires all public works contractors to maintain certified payroll records and to make them available to the State on request. These requirements to pay prevailing wages and maintain certified payroll records must be included as an express stipulation in any such public works contract. (Cal. Labor Code § 1773.2, 1775, and 1776(h)).

California Labor Code § 1775 provides for penalties if workers are paid less than the prevailing wage, and requires that every public works contract contain provisions authorizing the imposition of these penalties. Likewise, as a matter of state law, all public works contracts must contain provisions authorizing the imposition of penalties for failure to provide DLSE with certified payroll records. (Cal. Labor Code § 1776(g) and (h)).

Thus, each of the prime contractors that subcontracted work to G&G had agreed to the following contractual provisions in their public works contracts with the respective awarding bodies: (1) that prevailing wages would be paid to all workers employed on the project by the prime contractor and its subcontractors, (2) that certified payroll records would be kept, and provided to DLSE upon request, showing the hours worked and wages paid to all workers employed on the project by the prime contractor and its subcontractors, and (3) that the public agencies that had awarded the contracts could withhold contract payments to these prime contractors to cover unpaid wages and penalties if the agreements were breached (A-90).

Pursuant to California Labor Code § 1727, the public entity that awarded the contract must "withhold and retain therefrom all wages and penalties which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter." The withholding must be preceded by a "full investigation" by

either the DLSE or by the awarding body, except in the case of a final payment.

A withholding of payments from a prime contractor for unpaid prevailing wages and penalties can be challenged by filing a lawsuit to recover the withheld funds.[5] (Cal. Labor Code § 1730-1733.) Any such funds withheld from a public works contractor must be retained by the awarding body for 90 days following the completion of the contract. During that period, the contractor or his or her assignee may file a state court breach of contract action against the awarding body to recover the withheld funds. This breach of contract action "is the exclusive remedy of the contractor or his or her assignees" for the recovery of withheld wages and penalties. (Cal. Labor Code § 1732.) The action may be filed "without permission from the state or other authority," and it is "limited to the recovery of the wages or penalties" without prejudice to any other rights or issues arising under the contract. (Cal. Labor Code § 1733.) If an action is not brought within this retention period, the withheld funds are disbursed to the underpaid workers. If an action is brought within the retention period, the money is held in escrow until its resolution. These statutory provisions have been in effect for over sixty years.

Pursuant to California Labor Code § 1729, a prime contractor who has had a payment withheld by a public agency as a result of a subcontractor's failure to comply with its prevailing wage obligations can in turn withhold that amount from the funds the prime contractor would otherwise owe to the subcontractor under the subcontract. With an assignment from the prime contractor,

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[5] The public agency which is buying the construction work (pursuant to the various specifications, including the agreement to pay the prevailing wage) is buying the construction work from the prime contractor – not its subcontractors, who may be unknown to the public agency at the time the contract is awarded. The withholding under Cal. Labor Code § 1727 is only from payments to the prime contractor.

the subcontractor can then file a breach of contract action under California Labor Code § 1730-1733 to recover these funds from the public agency. If the subcontractor proceeds by way of assignment, that lawsuit is the subcontractor's exclusive remedy for the recovery of the withheld funds. (Cal. Labor Code § 1732.) But if the subcontractor does not obtain an assignment, the subcontractor can pursue an alternative statutory remedy under the California Civil Code, consisting of the right to file a "stop notice", setting forth the amount owed by the prime contractor to the subcontractor for work performed under the subcontract. The stop notice is filed with the public agency that awarded the contract. (Cal. Civil Code § 3103, 3181, 3184.) Upon receipt of a timely stop notice, the public agency is obligated to withhold from the prime contractor an amount sufficient to pay the claim stated by the subcontractor. (Cal. Civil Code § 3186.) The subcontractor may file "an action against the [prime] contractor and the public entity to enforce payment of the claim stated in the stop notice . . . at any time after 10 days from the date of the service of the stop notice upon the public entity. . . . " (Cal. Civil Code § 3210.)

Disdaining utilization of any of its viable state law remedies, G&G filed a lawsuit against these petitioners in the United States District Court for the Central District of Los Angeles.

B. Proceedings Below

1. The District Court Proceedings

G&G brought this action for declaratory and injunctive relief under 42 U.S.C. §§ 1983 and 28 U.S.C. § 2201-2202, claiming that the issuance of the notices to withhold without a prior hearing constituted a deprivation of property without due process of law, in violation of the Fourteenth Amendment. The state responded with a motion to dismiss, and G&G later filed a motion for summary judgment. The district court denied the state's

motion to dismiss and granted G&G's motion for summary judgment. The district court's judgment declared §§ 1727, 1730-1733, 1775, 1776(g) and 1813 of the California Labor Code unconstitutional, and enjoined the state from enforcing those statutes against G&G.

2. The Ninth Circuit Proceedings

On February 3, 1998, Judge Hawkins, joined by Judge Reinhardt, issued an opinion, in part affirming and in part reversing the district court, and remanding the case for further proceedings consistent with the opinion. Judge Kozinski vigorously dissented. The panel majority held that due process requires that the state provide a subcontractor with either a pre- or prompt post-deprivation hearing when withholding payments from a public works contractor for unpaid wages or penalties. This holding is founded upon the majority's view that a subcontractor "has a property interest in being paid in full for the construction work it completed," and that this interest, which "arises from its[6] public works contract", is protected by the Due Process Clause. 136 F.3d at 595-597 (A-63, footnote added.) The panel also concluded, however, that the district court's injunction was overbroad in that the challenged withholding provisions, while unconstitutional as applied, were not facially invalid.

In his dissent, Judge Kozinski protested the majority's "categorical approach that turns every right to receive payment on a public works contract into a property right protected by due process." 136 F.3d at 602 (A-81) Instead, Judge Kozinski maintained that any rights

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[6] No party contended at any stage in this litigation that G & G, with respect to the three public works contracts at issue herein, was anything but a subcontractor – i.e., that it (rather than the prime contractors) had entered into any contracts with these public agencies.

arising under commercial contracts, such as service contracts, material supply contracts, and construction contracts, are not protected by the Due Process Clause.

Judge Kozinski warned that the majority decision not only conflicts with the opinions of other circuits, but that it is "very bad policy" because it saddles the state, when it engages in "the purely commercial activity of construction", with "a burden not suffered by private builders", who routinely put provisions for payment withholdings for failure (or suspected failure) of performance into their private construction contracts. 136 F.3d at 602 (A-81) Judge Kozinski explained that payment withholdings are consistent with the awarding bodies' activities as market participants, and that any contractor or subcontractor who objects to provisions for withholdings is free not to do business with the state. Consequently, a dispute over withholdings is nothing more than a "run-of-the-mill contract dispute", for which the subcontractors' remedy lies in a state court breach of contract action against the prime contractor, or, as an assignee of the prime contractor, against the awarding body. 136 F.3d at 603 (A-82)

Finally, Judge Kozinski cautioned that drastic consequences would result from the majority decision, as due process requirements would inexorably apply to *any* withholding of payments under any commercial contract with the state, be it a withholding for failure to pay prevailing wages, or in more mundane instances, a failure to complete a project on time or a failure to comply with applicable building codes.

3. Rehearing

The State petitioned for rehearing. This petition was granted, and on September 10, 1998, the panel issued an amended opinion and order. 156 F.3d 903. Once again, the panel split with Judge Kozinski in the minority. The only significant change in the majority's opinion is its concession that "the state's interest in ensuring payment of prevailing wages is sufficiently important to justify the

withholding of funds pending the outcome of whatever kind of hearing may be afforded." 156 F.3d at 903 (A-18), internal citation and quotation omitted.) Thus, the majority concluded that a pre-deprivation hearing is not required, but that a prompt post-deprivation hearing is necessary to satisfy due process requirements.

In his dissent to this amended opinion, Judge Kozinski found that under California law, every subcontractor who wishes to challenge a withholding has an adequate state law remedy. Under California Labor Code § 1733, a subcontractor with an assignment from the contractor can file a breach of contract action against the awarding body to recover sums withheld. Furthermore, Judge Kozinski noted, any subcontractor unable to obtain an assignment but whose payment had been withheld by the prime contractor could bring suit against the awarding body under various state law theories. 156 F.3d at 909 (A-50).

The panel majority, however, concluded that even if the aggrieved subcontractor could bring an action on the contract, that would not be sufficient. While conceding that this Court has held that in certain circumstances, a post-deprivation state court action may fulfill the requirements of due process, the majority held that the right to bring a breach of contract action to recover withheld payments, when the withholding was carried out by state officials pursuant to state policy, does not provide adequate due process.

On October 28, 1998, the court entered an order denying a petition for rehearing, indicating however that Judge Kozinski had voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

4. Certiorari in the Supreme Court

Petitioners petitioned for a Writ of Certiorai. This Court granted the petition on April 10, 1999, summarily vacating the Ninth Circuit's judgment and remanding the

case back for further consideration in light of *American Manufacturer's Mutual Insurance Co. v. Sullivan, supra.*

5. Additional proceedings in the Ninth Circuit

Following additional oral argument, the Ninth Circuit issued a third opinion on February 23, 2000. Determining that its prior reasoning "fits comfortably within the analytic framework set forth in *Sullivan*", Judges Hawkins and Reinhardt reinstated the prior judgment and opinion (204 F.3d 941) (A-1). Judge Kozinski again vigorously dissented, pointing out that "*Sullivan* fits the majority's rationale about as comfortably as Cinderella's slipper on the wicked step-sister's foot." He pointed out as well that, under the analysis mandated by this Court in *Sullivan*, the withholding by the prime contractor of funds from G&G was purely private conduct. Continuing on, he observed that the claim of G&G did not qualify as a valid property interest without a showing that G&G had met the prevailing wage requirements.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision conflicts with and constitutes a radical departure from the decisions of several other circuits, and raises important questions of federal law which this Court should resolve. The issue of whether a private company contracting with a state agency has a property right to payment within the meaning of the Due Process Clause of the Fourteenth Amendment is of paramount importance and affects every state, county, city, school district, and special use district in the nation. The additional issues of 1) whether a state is responsible for private action by contractors contracting with the state who take discretionary action against their subcontractors and 2) whether third parties who are indirectly impacted by governmental conduct have stated a claim for relief against a state are of manifest importance as well to state and local governments. Review of these issues by this Court is now imperative because the G&G

decision constitutes a drastic departure from the conclusions other circuits have reached when faced with these questions.

A. The Court's Determination That Constitutionally Protected Property Rights Can Be Founded Upon Any Breach Of A Commercial Contract With A State Agency Is In Conflict With Every Other Circuit That Has Considered This Issue And Threatens To Shift The Whole Body Of State Public Contract Law Into The Federal Courts.

The Ninth Circuit expressly determined that G&G's interest in getting paid in full under its public works contract constituted a cognizable due process property right under the Fourteenth Amendment (A-30). As the carefully considered dissent of Judge Kozinski makes clear, the reductio ad absurdum of this novel conclusion is that every failure by the state to pay its bills on time would necessarily equate to an actionable constitutional violation in the federal courts. An obvious conflict presently exists between the Ninth Circuit's position on this point, as reflected in this decision, and the pronouncements of all other circuits that have considered the matter, with the Ninth Circuit being clearly the "odd man out" with respect to this question.

The Second Circuit in *S & D Maintenance Co. v. Goldin*, 844 F.2d 962 (2nd Cir. 1988), *Martz v. Village of Valley Stream*, 22 F.3d 26 (2nd Cir. 1994), and *Christ Gatzonis Electrical Contractor, Inc. v. New York City School Construction Authority*, 23 F.3d 636 (2nd Cir. 1994), e.g., has held that ordinary construction and supply contracts do not create property interests protected by the Fourteenth Amendment.

In each of these Second Circuit cases, contractors filed actions under 42 U.S.C. § 1983 against public agencies that had withheld contract payments, asserting that the withholdings without hearings constituted a violation of due process. The Second Circuit held that the contractual relationship between a contractor and a public

agency does not create a constitutionally protected interest in the payment of sums allegedly due pursuant to the contract. In a careful analysis that distinguishes between ordinary contract rights and property rights that are protected under the Due Process Clause, the Second Circuit reasoned:

> "An interest in enforcement of an ordinary commercial contract with a state is qualitatively different from the interests the Supreme Court has thus far viewed as 'property' entitled to procedural due process protection. . . . [T]he Due Process Clause is invoked to protect something more than an ordinary contractual right. Rather, procedural protection is sought in connection with a state's revocation of a status, an estate within the public sphere characterized by a quality of either extreme dependence in the case of welfare benefits, or permanence in the case of tenure, or sometimes both, as frequently occurs in the case of social security benefits. . . . But we hesitate to extend the doctrine further to constitutionalize contractual interests that are not associated with any cognizable status of the claimant beyond its temporary role as a government contractor." *S & D Maintenance Co., supra,* 844 F.2d 966-67.

This analysis, distinguishing ordinary contract rights from the sort of property that is protected by due process, resonates in the decisions of other circuits as well. Justice Breyer, then on the First Circuit, wrote: "A mere breach of a contractual right is not a deprivation of property without constitutional due process of law. . . . Otherwise virtually every controversy involving an alleged breach of contract with a governmental institution or agency or instrumentality would be a constitutional case." *Bleeker v. Dukakis,* 665 F.2d 401, 403 (1st Cir. 1981). The Seventh Circuit, in affirming the dismissal of a section 1983 action brought by county employees asserting that the county violated their due process rights by its refusal to abide by

a contract to permit time off in compensation for overtime hours worked, cautioned that "[t]here is reason to doubt whether the Fourteenth Amendment was intended to allow every person with a breach of contract claim against a state to bring that claim in federal Court", and that the Amendment was "not intended to shift the whole of the public law of the states into the federal courts." *Brown v. Brienen,* 722 F.2d 360, 364 (7th Cir. 1983).

The Third Circuit, has likewise observed that "if every breach of contract by someone acting under color of state law constituted a deprivation of property for procedural due process purposes, the federal courts would be called upon to pass judgment on procedural fairness of the processing of a myriad of contract claims against public entities," and that "the wholesale federalization of state public contract law seems far afield from the great purposes of the Due Process Clause." *Reich v. Beharry,* 883 F.2d 239, 242 (3rd Cir. 1989). Following this analysis, the Third Circuit upheld a summary judgment against a building contractor as to a section 1983 claim asserting a property interest in its contract with a city housing authority, while permitting the contractor's claim for unpaid compensation for work allegedly performed under the contract to proceed under the state public contract law. *Linan-Faye Construction Co., Inc. v. Housing Authority of the City of Camden,* 49 F.3d 915 (3rd Cir. 1995). The court further held that whatever severe consequential damages the contractor may have suffered as a result of the housing authority's allegedly wrongful retention of the contractor's performance bond, that fact "cannot convert a contract claim into a deprivation of liberty." *Ibid.,* at 932.

With its decision in *G&G,* the Ninth Circuit became the only circuit to find an enforceable property right under the Fourteenth Amendment in a contract between a public agency and a contractor. Prior to *G&G,* the Ninth Circuit stood in the mainstream of federal law on the issue. In *San Bernardino Physicians' Services Medical Group, Inc. v. County of San Bernardino,* 825 F.2d 1404, 1408 (9th

Cir. 1987), the court explained "[e]ven though every contract may confer some legal rights under state law, that fact alone need not place all contracts within federal due process protection." In drawing the line between those government contracts that may create rights that are protected by the Fourteenth Amendment and those that do not, the court focused on the distinction between employment contracts and ordinary commercial contracts, such as contracts to perform a construction project or to supply the state with services or materials. "The right of an individual not to be deprived of employment that he or she has been guaranteed is more easily characterized as a civil right, meant to be protected by section 1983, than are many other contractual rights." *Ibid.*, at 1409. Consequently, "the farther the purely contractual claim is from an interest as central to the individual as employment, the more difficult it is to extend it constitutional protection without subsuming the entire state law of public contracts." *Ibid.* Based on this analysis, the court held that a corporation's contract to supply medical services to a county hospital does not implicate any constitutionally protected interest, and that such a "contract to supply services to the state cannot sensibly be distinguished from construction contracts or even purely material supply contracts, for purposes of federal protection." *Ibid.*, at 410.

The *G&G* panel majority abandoned this restrained approach in favor of a sweeping expansion of property rights and due process protections. G&G's constitutional claim, according to the panel majority, "arises from its public works contract; it has a property interest in being paid in full for the construction work it has completed." (A-30) Assuming, *arguendo*, that a subcontractor that lacks privity of contract with an awarding body can nonetheless assert a claim based on the awarding body's contract with the prime contractor, the question that must be carefully addressed is whether, under either the public

works contract or applicable state law, there is an entitlement to prompt payment in full once the job is purportedly completed. The answer to this question is that under the California prevailing wage law, and under the contracts that G&G relies on as a basis for its due process claim, there is no entitlement to payment of sums withheld for unpaid wages and penalties. These contracts expressly provide for the withholding of payments to cover unpaid wages and penalties. The contractor's right to payment in full is contingent not only on completion of the work, but also, on the contractor's and its subcontractors' compliance with prevailing wage and certified payroll record keeping requirements.

In both *S & D Maintenance* and *Christ Gatzonis Electrical Contractor*, the Second Circuit held that there can be " 'no legitimate claim of entitlement' to funds allegedly due" pursuant to "a contract [that] vested the municipal official with discretion to withhold interim payments." *Christ Gatzonis Electrical Contractor, Inc., supra*, 23 F.3d at 640. This holding stems from the application of the well known test adopted in *Board of Regents v. Roth*, 408 U.S. 564, 576-78, 92 S. Ct. 2701, 2708-09, 33 L. Ed. 2d 548 (1972). Under this test, "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . . " 408 U.S. at 577, 92 S. Ct. at 2709.

In contrast, the Ninth Circuit *G&G* panel majority looks beyond state law, and beyond the state's contracts, to the Constitution as an independent source of property rights. Ultimately unable to find any basis for G&G's asserted property interest in the provisions of the public works contracts or in state law, the panel majority relies on *Snaidach v. Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969) to conclude that although G&G has no right to prompt payment (and no right to a deprivation hearing) under the state's statutory scheme, any withholding under this scheme is constitutionally infirm. *Snaidach*, however, is inapposite. In a garnishment

case, such as *Snaidach*, a creditor seeks to seize funds that are indisputably owed by a third party to the debtor. The funds being seized are the debtor's property. In contrast, in a public works contract case such as this, there is inevitably a substantive dispute between the immediate parties to the contract as to whether the contract requires payment of the amounts withheld. The awarding body did promise to make the payment; but the contractor promised, inter alia, that prevailing wages would be paid and that certified payroll records would be kept and made available as conditions precedent to receiving payment. To say that the contractor is entitled to the withheld funds, and therefore that the state's failure to make payment has deprived the contractor of its "property" without due process of law, is to decide the merits of the substantive dispute – a dispute founded upon a breach of contract claim – between the contracting parties.[7]

If the Ninth Circuit's reasoning on this point is to stand as legal precedent, then every failure by a state, county or municipality to pay its bills on time will arguably constitute an actual deprivation of due process. Under this misconceived theory every contractual sow's ear is to be converted to a constitutional silk purse. The result, which a more circumspect Ninth Circuit earlier warned against in *San Bernardino Physician Services, supra*, and the Seventh Circuit warned against in *Brown v. Brienen, supra*, will be the inevitable shifting "of the whole of the public law of the state into the federal courts", courts which are already overburdened with a demanding caseload. For the first time, federal district courts will be required to routinely adjudicate local construction disputes, including but not limited to claims

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[7] As the California courts have held "[u]nder the statutory scheme presently before us, in acting pursuant to Labor Code section 1727 the state did not take property belonging to plaintiffs; rather it withheld sums pursuant to the terms of its contract with plaintiffs." *O.G. Sansone Co. Department of Transportation* (1976) 55 Cal. App. 3d 444, 455, 127 Cal. Rptr. 799.

concerning the adequacy of plumbing, heating and air conditioning improvements and compliance or noncompliance with state and municipal building codes.

B. The Standard Adopted By The Ninth Circuit For Determining Whether Or Not State Action Exists Directly Conflicts With This Court's Explicit Guidelines And Instructions In *Sullivan*

As aforementioned, upon the vacating of the Ninth Circuit's decision by this Court, the case was remanded to the Ninth Circuit for further consideration in light of *American Manufacturers' Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977 (1999). The instructions of this Court were apparent and unmistakable: G&G's rights in this action, if any, were to be reexamined in light of the express teachings of *Sullivan*. While the majority of the panel gave lip service to *Sullivan*, in actuality it rendered a decision which clearly disregards its principles.

Respondents in *Sullivan* attacked on due process grounds a Pennsylvania law authorizing the withholding by private insurers of medical benefits from employees in workers compensation cases without a hearing where the insurer submitted a form to the State contesting the reasonableness or necessity of the treatment provided. Respondents argued that these benefits could not be withheld by the insurers without a hearing. An issue also arose concerning whether the withholding of medical payments pursuant to the Pennsylvania law by the insurers constituted state action within the meaning of 42 U.S.C. § 1983. This Court rejected all of respondents' arguments, expressly finding, *inter alia*, that the withholding by the insurers was not state action.

Petitioners herein contend that on the issue of state versus private action, the operative facts in this case are strikingly similar to those in *Sullivan*. G&G was a subcontractor under a public works contract. California law authorizes DLSE to issue a notice to withhold funds from the prime contractor on a public works project if his

workers or the workers of his subcontractors have not been paid the prevailing wage. Upon issuance of the notice to withhold, the awarding body withholds an equivalent amount from the funds otherwise due the prime contractor. California Labor Code §§ 1727, 1774, 1775. There is no requirement in the law that the amount withheld from the prime contractor must likewise be withheld by the prime contractor from the subcontractor. The awarding body does not itself deduct any funds from the subcontractor. Section 1729, however, allows the prime contractor to deduct a like amount from its payments to the subcontractor "on account of the subcontractor's failure to comply with" the prevailing wage law, if the prime contractor chooses to do so. Here, funds were withheld from G&G's prime contractor after the issuance of notices to withhold pursuant to these code sections and the prime contractor decided, in its sole discretion, and as a self-help remedy, to deduct a like amount from the money it may have otherwise owed G&G. Indeed, whether the prime contractor owed any funds to G&G in the first instance under the terms of its subcontract with G&G is unknown.

As in *Sullivan*, the inquiry must begin in this case with the threshold principle that section 1983 "excludes from its reach merely private conduct, no matter how discriminatory or wrongful." 526 U.S. 40, 48 (1999). Under this basic tenet of law, the federal courts have no jurisdiction over a 1983 action unless the plaintiff can plead and prove that there was demonstrable state action.

The issue of state action under section 1983 has long been litigated in the federal courts, with the result that several well-established principles have emerged. Thus, it has been concluded that the fact, standing alone, "that a business is subject to state regulation does not convert its action into that of the State for purposes of the Fourteenth Amendment." *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S. Ct. 2777 (1981); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350, 95 S. Ct. 449 (1974). It is also clear that a

plaintiff seeking relief under section 1983 must affirmatively show "a sufficiently close nexus" between the State and the challenged action so that "the latter may be fairly treated as that of the State itself." *Blum, supra*, 457 U.S. at 1004. Finally, the State can be held responsible for private action "only when it has exercised coercive power or has provided significant encouragement, either overt or covert, that the choice must in law be deemed that of the State." *Blum, supra*, 457 U.S. at 1004; *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 166, 98 S. Ct. 1789 (1978).

In deciding *Sullivan*, this Court expressly confirmed these longstanding principles. Its opinion points out that "action taken by private entities with the mere approval or acquiescence of the State is not state action." Going further, in words that echo resoundingly in this case, this Court declared that "[t]he mere availability of a remedy for wrongful conduct even where that remedy serves important public interests does not so significantly encourage the private entity so as to make the State responsible for it." 526 U.S. 40, 49.

The application of these principles in light of *Sullivan* made it abundantly clear the result required in this case. There, as here, the state law authorized a private business to withhold funds under certain conditions. In *Sullivan*, withholding was justified if the employer or insurer suspected that the treatment was not reasonable or necessary and filed a form with the state to that effect. In this case withholding is only authorized under section 1729 "on account of the subcontractor's failure to comply" with the law. In both cases the applicable statute did not mandate withholding by the third party, it only permitted it. The decision whether or not to withhold was in the sole discretion of the private party, not the sovereign.

There can accordingly be no logical distinction between the effect of the withholding sanctioned by California law in this case and the effect of the withholding which survived judicial scrutiny in *Sullivan*. If anything, there is arguably lesser participation by the State in this case than there was in *Sullivan*, since there the actual

withholding required government approval, albeit pro forma approval, while here no official approval was mandated by law prior to withholding. Otherwise, with respect to the operative factors discussed by the Supreme Court, this case and *Sullivan* are indistinguishable in law. The result in *Sullivan* with respect to the issue of state action clearly compelled a similar result in this case.

As in *Sullivan*, all the State did here was to provide a remedy to the prime contractor, a remedy for relief from the subcontractor's violations of the prevailing wage law. The State of California did not mandate utilization of this remedy any more than the State of Pennsylvania mandated withholding. The teaching of *Sullivan* is unequivocal: "[p]rivate use of state-sanctioned private remedies does not rise to the level of state action." 526 U.S. 40, 49.

The majority of the Panel concluded that the "withholding here was specifically directed by State officials in an environment where the withholding party had no discretion at all" (204 F.3d at 944). This statement, the factual cornerstone of the Panel majority's reasoning in this case, represents a confusion of two separate and distinct events. It refers both to the issuance by DLSE of notices to withhold to the awarding body, who then withholds from the prime contractor, on the one hand, and the possible withholding from the subcontractor by the prime contractor, on the other. But the actual taking by the prime contractor from the subcontractor, which is the act complained of in this case, consists solely in the discretionary withholding by the prime contractor, a private party, from the subcontractor. The prime contractor has the absolute power to withhold or not withhold. If the majority was confused about this distinction, Judge Kozinski was not, as he correctly points out in his dissent the problem with the majority's reasoning:

> "This would be true had the prime contractor been ordered, under penalty of law, to withhold funds from G&G. It was not. The only entity 'specifically directed' to withhold funds was the awarding body, which withheld funds only from the prime contractor, not from G&G. While the challenged provisions authorized – even encouraged – the prime to withhold an equivalent amount from G&G, the prime was free to pay G&G the full amount specified by the contract. *Sullivan* clearly holds that mere authorization and encouragement do not render a private entity's decisions 'fairly attributable' to the state. 119 S. Ct. at 986. Under *Sullivan*, then, the prime contractor who chose to deprive G&G of its alleged property was not a state actor" (A-8-A-9).

Here, as in *Sullivan*, there was no evidence before the Court to show that the action of the private entity complained of was the result of either the "coercive power" or "significant encouragement" of the State. The actual evidence, in fact, was plainly to the contrary. The prime contractor may indeed under the particular circumstances prevailing at the time, find it in his business interest to withhold funds from the subcontractor, but he clearly need not do so,[8] and, in fact, he need fear no adverse response from the state if he chooses not to withhold, the state being satisfied to receive the money it claims is owed.

Federal decisions in other circuits since *Sullivan* was decided have, unlike the Ninth Circuit, faithfully applied its teachings with respect to the issue of state versus private action in a variety of factual situations. In *Lansing v. Memphis*, 202 F.3d 821, 831-833 (6th Cir. 2000) a private nonprofit corporation authorized by the City of Memphis to promote tourism in a "Memphis in May" program in a park owned by the city was determined not to be a state actor when it excluded a preacher from the park with the

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[8] A prime contractor might decline to withhold from the subcontractor, for example, because the former is holding substantial funds payable to the latter as progress payments in the future.

assistance of local police. In *Austin v. Paramount Parks, Inc.*, 195 F.3d 1727 (4th Cir. 1999) a private security guard at an amusement park was held not to be engaged in state action despite the fact he obtained an arrest warrant through the auspices of a local county sheriff. *See also* discussions of the state action criteria of *Sullivan* in *DeBauche v. Trani*, 191 F.3d 499, 507-508 (4th Cir. 1999) and *Perkins v. Lombardy Basketball Club*, 196 F.3d 13, 19 (1st Cir. 1999).

The reasoning of the Ninth Circuit, as we have seen, is grounded on misconceived "facts", i.e., that the prime contractor had no choice but to withhold from the subcontractor. This statement has no support in the record and is plainly at variance with the true circumstances. The undisputed truth is that the prime contractor had the absolute discretion to withdraw or not withdraw funds from the subcontractor. It was not compelled to do the former. Where, as here, the evidentiary underpinnings for a determination fall, the determination itself must fall.

G&G's claim accordingly lacks a fundamental jurisdictional element under section 1983, the element of state action. It was evident from the record that G&G would never be able to cure this defect. The case should accordingly have been remanded to the District Court with instructions to dismiss this action with prejudice for lack of jurisdiction.

C. The Ninth Circuit Misapplied The Established Rule Concerning Indirect Deprivations And Due Process

A companion issue to the issue of state versus private action is the question of whether G&G was foreclosed from proceeding against petitioners because the action of the State in withholding funds from the prime contractor only impacted G&G indirectly.

The sole action taken by petitioners, i.e., the issuance of notices to withhold to the contracting public bodies based on G&G's noncompliance with the prevailing wage law, was taken solely against the prime contractors, who

thereafter unilaterally chose to withhold monies due G&G for work performed under its subcontracts. While the law allows the prime contractor to deduct wages and penalties from the subcontractor, the decision is that of the prime contractor, not the state. Petitioners have contended all along that the alleged deprivation of G&G's rights is indirect at best (A-66).

> "Over a century ago this Court recognized the principle that the due process provision . . . does not apply to the *indirect adverse effects* of governmental action. Thus, in the *Legal Tender Cases*, 12 Wall. 457, 551, the Court stated:
>
> > 'That provision has always been understood as referring only to a *direct* appropriation, and not to consequential injuries resulting from the exercise of legal power. It has never been supposed to have any bearing upon, or to inhibit laws that *indirectly* work harm and loss to individuals.' "

O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 788-789, 100 S. Ct. 2467 (1980) (emphasis added).

The Ninth Circuit refused to apply the principle of *O'Bannon* and its progeny, finding that G&G, as a subcontractor, was the "target of the state's action here" (A-67) and that, therefore, this case falls within an exception noted in *O'Bannon*, i.e., where action is taken by one party for the purpose of "punishing" another. Appellants submit, however, that this is yet another misreading of the record in the case by the Ninth Circuit, there being absolutely no evidence to support the conclusion that either the intent or the policy of the state in enforcing the prevailing wage law was at any time to target or punish G&G, or other subcontractors.

To ascribe such a motive to appellants is unwarranted, particularly in view of the fact that the California courts have uniformly found that the purpose of the prevailing wage law, far from being a punitive one, is to foster the public welfare.

> "The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absences of job security and employment benefits enjoyed by public employees."

Lusardi Construction Co. v. Aubry (1992) 1 Cal. 4th 976, 987, 4 Cal. Rptr. 2d 847.

None of the opinions of the Ninth Circuit in this case referred to any evidence that suggests that in enforcing its contract the state was acting for any purpose other than that set forth in *Lusardi*, because, as noted, no such evidence exists. Not even G&G has argued that the state acted with the motive assigned by the court in issuing the notices to withhold. Certainly there was nothing before the majority from which it could have inferred that the state acted with a specific intent to impact G&G; it therefore had no factual basis upon which to draw such an inference.

The mere knowledge that an adverse impact on third parties is likely to follow from the enforcement of the law is clearly not enough to vitiate the reasoning in *O'Bannon*. Thus, the fact that the state had reason to know that the withholding from the prime contractor might impact G&G is no more significant than the fact that in *O'Bannon* the government had reason to know that the cessation of reimbursements to a medical facility would impact its patients; that the Department of Agriculture had reason to know that the closing of a store would impact the employees of the store [*Castaneda v. U.S. Department of Agriculture*, 807 F.2d 1478 (9th Cir. 1987)]; that the U.S.

Department of Education had reason to know that revoking student aid to a college would impact the students [*Grove City College v. Bell*, 687 F.2d 684, 704 (3rd Cir. 1982)]; or that the U.S. Department of Energy had reason to know that its offering of free storage facilities for nuclear waste would impact those in the business of providing such facilities. [*Nuclear Transport & Storage v. United States*, 890 F.2d 1348 (6th Cir. 1989)]. Yet the injured third parties suing in these cases, all of whom had as strong a claim as G&G has here, were held to be only indirectly affected by the government's action and, therefore, could state no due process claim.

The state has decided to conduct its business like every builder in the private sector by electing to contract and deal exclusively with the prime contractor. The decision of the Panel clearly flies in the face of the long judicially acknowledged right of a state to dictate the terms and conditions upon which public works will be performed by private contractors.

In *Atkin v. Kansas*, 191 U.S. 207, 24 S. Ct. 124 (1903), the Supreme Court upheld challenged Kansas legislation providing for maximum hours of work and requiring minimum rates of pay on public works projects. The Court stated:

> "It cannot be deemed a part of the liberty of any contractor that *he* be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. *On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities.* No court has authority to review its actions in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern." 191 U.S. at 222-223 (emphasis added).

In *Perkins v. Luekens Steel Co.*, 310 U.S. 113, 60 S. Ct. 869 (1940), an attack was made on the Public Contracts Act, a statute setting forth standards for those who deal with the federal government. This Court upheld the law, pointing out that '[l]ike private individuals and businesses, the government enjoys the unrestricted power to produce its own supplies, *to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.*" 310 U.S. at 127 (emphasis added).

Correctly viewed, the terms and conditions of the state's public works contracts merely empower it and its political subdivisions to do what every private proprietor in the marketplace does, deal on building projects with a single prime contractor who, in turn, has the direct responsibility for the companies and individuals it chooses to select as subcontractors on the project. This is a practice that has existed as long as there has been a building industry in this country. *See, e.g.*, discussion in Haggerty, *Real Estate Construction Current Problems* (Practicing Law Institute, 1973), p. 47, et seq. Business efficiency dictates that the owner (in this case the State) be permitted to look to and deal exclusively with the prime contractor, the only party with which it is in privity of contract, and to say that it holds the prime contractor accountable for all failures or defects in performance, whether they in fact be due to the fault of the prime contractor or one of its subcontractors.

As the cases cited *supra* declare, this is the State's right as a proprietor. This being the case, it cannot be fairly argued that the State's actions in this regard are tantamount to punishing or targeting those with whom it does not contract.

D. The Ninth Circuit's Decision Obliterates The Criteria Set Forth In *Sullivan* For Determining When Sufficient Property Interests Exist For Purposes Of Due Process

This Court in *Sullivan* further held that the workers compensation claimants in that case had no property right to a hearing because they had not made a showing of the basic elements of entitlement to the money withheld, *i.e.*, that the medical treatment in question was reasonable and necessary. Having failed to make such a showing, they were not entitled to any relief.

> "Respondents obviously have not cleared both of these hurdles. While they indeed have established their initial *eligibility* for medical treatment, they have yet to make good on their claim that the particular medical treatment they received was reasonable and necessary." 526 U.S. 40, 49.

It is apparent upon the most cursory analysis that G&G's claim in this case is subject to the same infirmity as the claims in *Sullivan*. It has never made any kind of a showing at any level that it was entitled to the funds withheld by its prime subcontractor. It has never, in fact, even alleged any entitlement to these funds (A-91). Clearly, under *Sullivan*, it has fallen far short of meeting its affirmative burden. Its failure to "clear" these essential "hurdles" in its pleadings must be assumed to lie in the fact that in actuality it can establish no valid claim on the merits.

The action G&G filed in the District Court sought only declaratory and injunctive relief on constitutional grounds for the failure of DLSE to grant a hearing prior to the issuance of the notices to withhold. Significantly, G&G did not seek recovery of the funds withheld. While G&G alleged in that action that the notices to withhold

were "wrongful" and "arbitrary and unreasonable,"[9] it has never alleged, and could never allege, either in the District Court or thereafter, that it was in compliance with the prevailing wage law requirements and had therefore met all of the conditions entitling it to payment in full. There is not even an allegation in the First Amended Complaint that all contractual conditions precedent to receipt of the funds (*i.e.*, full performance of the terms of the contract) were satisfied. Instead, G&G took the simplistic position, contrary to the express reasoning of *Sullivan*, that the withholding without a hearing in and of itself necessarily constituted a deprivation of due process, regardless of the validity of G&G's claims on the merits. This contention is contrary to law and to well-established legal precedents existing prior to *Sullivan*.

G&G's allegations of entitlement to these withheld funds are accordingly clearly lacking. As this Court stated years ago in *Board of Regents v. Roth, supra*, 408 U.S. 564, 577, 92 S. Ct. 2701 (1972) in considering the nature of property interests for purposes of due process:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."

What is clearly missing in G&G's pleadings is the statement of "a legitimate claim of entitlement" to the funds withheld. Without such threshold allegations, G&G cannot be heard to argue that it is entitled to relief in either this Court or the district court.

Judges Hawkins and Reinhardt elected not to address this fundamental failing on G&G's part. (A-6). They simply glossed over the fact that G&G, having failed to set forth its entitlement to the funds by not alleging it had

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[9] It is well-settled that such conclusionary allegations are insufficient to defeat a motion to dismiss for failure to state a claim. *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996); *Anderson v. Clow*, 89 F.3d 1399, 1403 (9th Cir. 1996).

performed all the terms of its contract, had not stated a claim upon which any relief could be granted.

Judge Kozinki's learned dissent, on the other hand, points out that "G&G can have no property interest in being paid for work that has not been shown to satisfy the contractual conditions that it be completed in accordance with the prevailing wage requirements." (A-11).

G&G must be made, like any other litigant, to stand or fall on the sufficiency of its pleadings, pleadings in this instance that omitted essential allegations necessary to maintain its due process claims. As the Ninth Circuit has observed in comparable circumstances, "[a] complaint is not a puzzle, however, and we are loathe to allow plaintiffs to tax defendants, against whom they have leveled very serious charges, with the burden of solving puzzles in addition to the burden of formulating an answer to their complaint." *In re Glenfed, Inc. Securities Litigation*, 42 F.3d 1541, 1554 (9th Circ. 1994).[10]

Having failed to address, let alone prove at any stage of the administrative or judicial proceedings, its entitlement to the funds withheld by its prime contractor, G&G cannot be heard to suddenly argue at this juncture, in view of the manifest teachings of *Sullivan*, that it had a property right for due process purposes to a hearing in this case.

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[10] Conclusionary allegations are insufficient to defeat a motion to dismiss for failure to state a claim. *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996); *Anderson v. Clow*, 89 F.3d 1399, 1403 (9th Cir. 1996).

CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

G & G FIRE SPRINKLERS, INC.,

Plaintiff-Appellee,

v.

VICTORIA L. BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her capacity as Deputy Labor Commissioner of the State of California,

Defendants-Appellants.

No. 95-56639
D.C. No.
CV-95-04839-MLR

G & G FIRE SPRINKLERS, INC.,

Plaintiff-Appellee,

v.

VICTORIA L. BRADSHAW, an individual in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California,

Defendants-Appellants.

No. 96-55194

D.C. No.
CV-95-04839-MLR

ORDER

On Remand from the United States Supreme Court
April 19, 1999.

Argued and Submitted
September 14, 1999 – Pasadena, California

Filed Feb. 23, 2000.

Before: Stephen Reinhardt, Alex Kozinski and Michael Daly Hawkins, Circuit Judges.

Order; Dissent by Judge Kozinski.

ORDER

In *G & G Fire Sprinklers, Inc. v. Bradshaw*, 156 F.3d 893 (9th Cir. 1998), we held that California Labor Code provisions authorizing the state to seize money and impose penalties for a subcontractor's failure to comply with prevailing wage requirements violated the Due Process Clause of the Fourteenth Amendment. *See id.* at 904. The Supreme Court granted certiorari, vacated our judgment, and remanded "for further consideration in light of *American Manufacturers Mutual Insurance Company v. Sullivan*, 119 S.Ct. 977, (1999)." *Bradshaw v. G & G Fire Sprinklers, Inc.*, 119 S.Ct. 1450 (1999). Having determined that *Sullivan* is fully consistent with our analysis, we reinstate the judgment and opinion.

DISCUSSION

Sullivan involved the Pennsylvania Workers' Compensation Act, under which an employer or its insurer must pay for all "reasonable" and "necessary" medical treatment for work-related injuries. *See* 119 S.Ct. at 982. Under the Pennsylvania scheme, an insurance company

could withhold payment for medical treatment if it disputed the reasonableness or necessity of that treatment. *See* Pa. Stat. Ann. § 531(5) ("All payments to providers for treatment . . . shall be made within thirty (30) days of receipt of such bills and records unless the employer or insurer disputes the reasonableness or necessity of the treatment."). The *Sullivan* plaintiffs claimed that the failure to pay their contested benefit claims within thirty days, before a process was provided to resolve the dispute about the "reasonableness" of their treatment, amounted to a deprivation of due process.

Sullivan dealt with two questions: (1) whether the insurance company's decision to withhold payment for disputed medical treatment was fairly attributable to the State so as to subject insurers to the constraints of the Fourteenth Amendment, 119 S.Ct. at 984; and (2) whether the Due Process Clause requires workers' compensation insurers to immediately pay disputed medical bills prior to a determination that the medical treatment was reasonable and necessary. *Id.* at 985.

The first question concerns whether there is state action, since the Fourteenth Amendment does not reach private acts or actors. *Sullivan* repeats a familiar calculus to determine the presence of state action: there must be some deprivation of a constitutional right and the party charged with the deprivation must be fairly said to be a state actor. *Id.* at 986. The second question turns on whether the claimant has a property interest in the matter complained of.

The Supreme Court found that the *Sullivan* plaintiffs did not possess a property interest in the *immediate,*

unconditional payment for all medical treatment under the Pennsylvania statute. Nevertheless, the Court stated that the plaintiffs did have an interest in payment of "reasonable" medical costs, *see Sullivan,* 119 S.Ct. at 990, and went out of its way to make clear that its holding did not upset previous Supreme Court precedent supporting the conclusion that the plaintiffs had a property interest in their *claims* for payment. *See id.* at n.13 ("Respondents do not contend that they have a property interest in their claims for payment, as distinct from the payments themselves, such that the State, the arguments goes, could not finally reject their claims without affording them appropriate procedural protections.") (citing *Logan v. Zimmerman Brush Co.,* 45 U.S. 422, 430-31 (1982)). Justice Ginsburg, who provided the fifth vote necessary to make the due process discussion in *Sullivan* an opinion of the Court, further clarified this distinction in her concurrence:

> I join Part III of the Court's opinion on the understanding that the Court rejects specifically, and only, respondent's demands for constant payment of each medical bill, within 30 days of receipt, *pending determination of the necessity or reasonableness of the medical treatment.* I do not doubt, however, that due process requires fair procedures for the adjudication of respondents' claims for workers' compensation benefits, including medical care.

Sullivan, 119 S.Ct. at 991 (emphasis added) (citation omitted).

Our opinion adopts the approach explicitly preserved by the *Sullivan* majority and unequivocally

adopted in Justice Ginsburg's concurrence. We specifically held that G & G did not have a right to payment of the disputed funds pending the outcome of whatever kind of hearing would be afforded to determine whether G & G complied with the California prevailing wage laws. *See G & G Fire Sprinklers*, 156 F.3d at 903-04. To the contrary, we explicitly authorized the withholding of payments pending the hearing. *See id.* G & G's due process rights were violated, we held, not because it was denied immediate payment, but because the California statutory scheme afforded no hearing at all when state officials directed that payments be withheld.[1] *See id.* at 904. Nor can there be any doubt whether the action at issue here was compelled by the State. The withholding in *Sullivan* was carried out by a private insurer exercising its discretion in a way permitted by State law. The withholding here was specifically directed by State officials in

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[1] It is true that our opinion addressed the withholding of payments pending the outcome of the hearing to determine contractor compliance in its discussion of the "process due" to a protected property interest, and not in its discussion of the nature of the property interest protected. In contrast, the above discussion in *Sullivan* is situated in the Supreme Court's discussion of the existence or nonexistence of a protected property interest. But this does not reduce the relevance of *Sullivan's* reasoning. As the Court recognized in the seminal due process case *Mathews v. Eldridge*, the definition of a protected property interest often includes a temporal component. *See* 424 U.S. 319 (1976) (identifying the property interest at stake as the beneficiary's interest in continuing to receive benefits for approximately one year). For this reason, issues of timing can arise at either the property-determination or the process-determination stage.

an environment where the withholding party has no discretion at all. Moreover, in their complaint the plaintiffs directly attack the notices of withholding issued by the state agency, alleging that they were issued "arbitrarily and unreasonably."

Because our holding is not contrary to the Court's ruling in *Sullivan*, and because our opinion's reasoning fits comfortably within the analytic framework set forth in *Sullivan*, we REINSTATE the judgment and the opinion reported at 156 F.3d 893 (9th Cir. 1998).

KOZINSKI, Circuit Judge, dissenting:

I dissented from the original opinion in this case because I do not believe that relations among contracting parties are governed by the Due Process Clause merely because one of the parties happens to be a state. *See G & G Fire Sprinklers, Inc. v. Bradshaw*, 156 F.3d 893, 908 (1998) (Kozinski, J., dissenting). I continue to adhere to that view. But the Supreme Court has now directed us to reconsider our opinion in light of *American Mfrs. Mut. Ins. Co. v. Sullivan*, 119 S.Ct. 977 (1999). *See Bradshaw v. G & G Fire Sprinklers, Inc.*, 119 S.Ct. 1450 (1999). In response, the majority reinstates its original opinion without amendment, claiming that its reasoning "fits comfortably within the analytic framework set forth in *Sullivan*." Reinstatement Order at 1970. I must dissent once again, because *Sullivan* fits the majority's rationale about as comfortably as Cinderella's slipper on the wicked step-sister's foot.

Sullivan teaches that, to state a claim for relief under section 1983, G & G must identify both an alleged constitutional deprivation and a state actor who is responsible for it. *See Sullivan*, 119 S.Ct. at 985 (rejecting the argument that "we need not concern ourselves with 'the identity of the defendant' "). In deciding whether G & G has succeeded in this, *Sullivan* explains that we must begin "by identifying 'the specific conduct of which the plaintiff complains.' " *Id.* at 985 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). Here the only deprivation alleged by G & G was effected by the prime contractor, who withheld funds which G & G claims under a contract.[1] There's no state action.

The majority waves a magic wand by asserting that "[t]he withholding here was specifically directed by state officials in an environment where the withholding party has no discretion at all." Reinstatement Order at 1970. This would be true had the prime contractor been ordered, under penalty of law, to withhold funds from G & G. It was not. The only entity "specifically directed" to withhold funds was the awarding body, which withheld funds only from the prime contractor, not from G & G. While the challenged provision *authorized* – even *encouraged* – the prime to withhold an equivalent amount from G & G, the prime was free to pay G & G the full amount specified by the contract. *Sullivan* clearly holds that mere authorization and encouragement do not render a private entity's decisions "fairly attributable" to the state. 119

[1] *See G & G*, 156 F.3d at 901 n. 4 ("Here, G & G was not paid by its respective principal obligor, the prime contractor, and it is asking for an opportunity to contest that deprivation.")

S.Ct. at 986. Under *Sullivan*, then, the prime contractor who chose to deprive G & G of its alleged property was not a state actor.

This presents the same problem for G & G as it did for the plaintiffs in *Sullivan*. The Court's description of the *Sullivan* plaintiffs' attempt to get around this problem is equally apt here: "Perhaps hoping to avoid the traditional application of our state-action cases, respondents attempt to characterize their claim as a 'facial' or 'direct' challenge to the [provisions in question.]" *Id.* at 985. In like manner, G & G's claim comes to us in the garb of a "direct constitutional challenge to the state's regulatory power as embodied in these statutes. . . . " G & G, 156 F.3d at 902. The reinstated opinion assumes that, so long as standing requirements are satisfied, G & G may bring such a challenge. It then goes on to find a "causal link between G & G's injury and the state's action" sufficient to support standing. *Id.* at 900.

The problem is that standing deals only with whether the plaintiff "is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Flast v. Cohen*, 392 U.S. 83, 100 (1968). If the state's conduct does not violate the Constitution, there can be no question of standing – standing to challenge *what*? The violation alleged here is an unconstitutional deprivation of property. *Sullivan* tells us that the deprivation at issue cannot be attributed to the state. Therefore, the state cannot have violated G & G's right to due process. G & G is left with two alternatives: suing a depriver who is not a state actor, or suing a state actor who has committed no deprivation. The panel's opinion lets G & G get away with the latter, by substituting the

normal causation prong of standing analysis for the more intimate causal relationship required by the state action doctrine.[2] Were it permissible to thus turn a pumpkin into a carriage, the Court should have allowed the *Sullivan* plaintiffs to bring their "facial challenge," on the theory that, while the private insurers in that case were not state actors, the state bureau's authorization of their withholding created a "causal link" sufficient to support standing.[3]

In addition to ignoring *Sullivan's* state action holding, the majority fails to apply the other teaching of the case-that before finding a deprivation, we must carefully identify the nature of the property interest at stake. *See Sullivan*, 119 S.Ct. at 989-90 (holding that a statutory entitlement to payment for "reasonable" and "necessary" medical treatment cannot give rise to a property interest

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[2] *Compare G & G*, 156 F.3d at 899-900 (causation requirement for standing satisfied where choices of third party have been made " 'in such a manner as to produce causation and permit redressability' ") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992)), *with Sullivan*, 119 S.Ct. at 986 (no state action unless the state has " 'exercised coercive power' " or provided such significant encouragement that " 'the choice must in law be deemed to be that of the State' ") (quoting *Blum*, 457 U.S. at 1004).

[3] Like G & G, the *Sullivan* plaintiffs had also named as defendants the state officials who administered the challenged act. *See Sullivan*, 119 S.Ct. at 984. Yet after holding that the private insurers regulated by the act were not state actors, the Court held that this alone would be sufficient to reverse the Third Circuit's holding that the act violated due process. *See id.* at 989. The Court nevertheless went on to address the merits of the claim, because it thought the question an important one. *See id.*

until the payments in question have been proven to be reasonable and necessary). The opinion reinstated today asserts that G & G has a protectable property interest "in being paid in full for the construction work it has completed." *G & G*, 156 F.3d at 901. This cannot be so, for just as the *Sullivan* plaintiffs had no property interest in receiving payment for medical treatments that had not been shown to be "reasonable" and "necessary," G & G can have no property interest in being paid for work that has not been shown to satisfy the contractual condition that it be completed in accordance with prevailing wage requirements. Nevertheless, though the majority now attempts to recharacterize its position, *see* Reinstatement Order at 1969, its opinion remains unambiguous in holding that G & G has *already suffered* a deprivation for which the state is required to provide a post-deprivation hearing. *See G & G*, 156 F.3d at 903-04.

Even if the reinstated opinion actually rested on the rationale now attributed to it, we would still have a case of premature remediation. The majority's current position is that its holding is in line with previous Supreme Court precedent protecting plaintiffs' "property interest in their *claims* for payment." Reinstatement Order at 1968. If the property interest at stake here is G & G's *claim* for payment, however, when and how G & G was deprived of it? This is not a case like *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), where the plaintiff had filed a timely claim that was dismissed because of a procedural default committed by the state. *See id.* at 426-27. G & G has yet to attempt to file a claim in state court. How can the state

have deprived G & G of a legal claim it has never asked the state to enforce?

The reinstated opinion forces the state to create an entirely new administrative machinery if it wishes to withhold funds in accordance with the terms of its contract. *See G & G*, 156 F.3d at 905-06. The majority appears to believe this is justified by Justice Ginsburg's concurring statement in *Sullivan* that " 'due process requires fair procedures for the adjudication [of claims.]' " Reinstatement Order at 1969 (quoting *Sullivan*, 119 S.Ct. at 991 (Ginsburg, J., concurring)). No doubt it does. But this is not a case like *Goldberg v. Kelly*, 397 U.S. 254 (1970), where the Court, having identified a previously unrecognized property interest in welfare benefits, was obliged to create a new procedural regime to protect it. This is a claim for payment on a contract. There is a well-established "fair procedure" for dealing with such claims: an action for breach of contract in state court. It seems unlikely that Justice Ginsburg would regard such a time-honored procedure as inadequate to satisfy the demands of due process. The majority has not explained why working on a government contract heightens one's interest in receiving prompt payment so as to require procedural safeguards not available to other parties that have a disputed claim under a contract.

It is true that the law does not on its face guarantee that a subcontractor will attain an assignment enabling it to sue the awarding body. But G & G has not tried to

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[4] *Cf. Sullivan*, 119 S.Ct. at 988 (noting that the legal obligation to pay on a contract arises only after one has "initiated a claim and reduced it to a judgment").

obtain such an assignment from the prime contractor, nor has it given the state courts a chance to decide whether a subcontractor who has been denied such assignment nevertheless has an equitable right to sue under state law. Until these questions have been resolved against G & G, it simply cannot be said that the state has " 'finally reject[ed] their claims without affording them appropriate procedural protections.' " Reinstatement Order at 1968 (quoting *Sullivan*, 119 S.Ct. at 990 n.13).

To sum up, the reinstated opinion papers over a state action deficiency with standing analysis, identifies a property interest the Court has told us can't yet exist, and holds that due process entitles G & G to the creation of a new procedure bypassing the one all other unpaid contractors are required to use. A fairy godmother could do no more. Once again, I must respectfully dissent.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

G & G FIRE SPRINKLERS, INC.,

Plaintiff-Appellee,

v.

VICTORIA L. BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., Director; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her capacity as Deputy Labor Commissioner of the State of California,

Defendants-Appellants.

No. 95-56639

D.C. No.
CV-95-04839-MLR

ORDER AND
AMENDED
OPINION

G & G FIRE SPRINKLERS, INC.,

Plaintiff-Appellee,

v.

VICTORIA L. BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California,

Defendants-Appellants.

No. 96-55194

D.C. No.
CV-95-04839-R

Appeals from the United States District Court
for the Central District of California
Manuel L. Real, Chief District Judge, Presiding

No. 95-56639
Argued and Submitted
May 7, 1996 – Pasadena, California

No. 96-55194
Submitted August 27, 1997*
Pasadena, California

Filed February 3, 1998
Amended September 10, 1998

Before: Stephen Reinhardt, Alex Kozinski and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hawkins; Dissent by Judge Kozinski

COUNSEL

Thomas S. Kerrigan, State of California Department of Industrial Relations, Los Angeles, California for the defendants-appellants.

Stephen A. Seideman, Levin, Stein, Chyten & Schneider, Los Angeles, California, for the plaintiff-appellee in No. 95-56639.

Thomas J. McDermott and Harvey Rochman, Manatt, Phelps & Phillips, Los Angeles, California, for the plaintiff-appellee in No. 96-55194.

William P. Gemmill, Gascou, Gemmill & Thornton, Los Angeles, California, for the plaintiff-appellee on rehearing.

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*The panel finds this case appropriate for submission without argument pursuant to Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

Scott A. Kronland, Altshuler, Berzon, Nussbaum, Berzon & Rubin, San Francisco, California, for the amici curiae on rehearing.

ORDER

The Opinion filed on February 3, 1998, and appearing at 136 F.3d 587 (9th Cir. 1998), is amended as follows:

(1) Page 591, second column – the counsel listing is revised as follows:

Thomas S. Kerrigan, State of California Department of Industrial Relations, Los Angeles, California for the defendants-appellants.

Stephen A. Seideman, Levin, Stein, Chyten & Schneider, Los Angeles, California, for the plaintiff-appellee in No. 95-56639.

Thomas J. McDermott and Harvey Rochman, Manatt, Phelps & Phillips, Los Angeles, California, for the plaintiff-appellee in No. 96-55194.

William P. Gemmill, Gascou, Gemmill & Thornton, Los Angeles, California, for the plaintiff-appellee on rehearing.

Scott A. Kronland, Altshuler, Berzon, Nussbaum, Berzon & Rubin, San Francisco, California, for the amici curiae on rehearing.

(2) Page 596, first column, lines 29-31 – revise sentence to read "This case thus involves a direct constitutional challenge to the state's regulatory power as embodied in these statutes, not a mere contractual dispute."

(3) Page 597, second column, between the first full paragraph and the second full paragraph – insert:

> Here, we have no doubt that the state's interest in ensuring the payment of prevailing wages is sufficiently "important," *see Mallen*, 486 U.S. at 240, to justify the withholding of funds pending the outcome of whatever kind of hearing may be afforded. Whether a hearing is before or after the giving of notice or the actual withholding is a matter for the state to determine on the basis of the practical considerations involved. *See, e.g., Gilbert v. Homar*, 117 S. Ct. 1807, 1812 (1997) (citing *Morissey v. Brewer*, 408 U.S. 471, 481 (1972)).

(4) Page 597, second column, second full paragraph, line 1 – insert "however," between "case," and "subcontractors"

(5) Page 598, first column, first paragraph – delete paragraph beginning "What specific type of process" and ending "payments and assessing penalties.10" and substitute in its place:

> Although the decision as to which specific type of hearing will be afforded subcontractors may depend upon the factual circumstances, the state must, upon determining that a subcontractor has failed to pay prevailing wages, provide the contractor with a reasonably prompt hearing of some sort.[10] Pending the outcome of such a hearing, the state may withhold payments and penalty funds.[11]

The corresponding footnotes are as follows:

> [10] The question of when a post-deprivation hearing is adequate is separate from the question of what constitutes a sufficient post-deprivation procedure. The Supreme Court has made it clear that no single model is required in all cases, but that the nature of the deprivation and the other underlying circumstances dictate how much process is due. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978); *Goss v. Lopez*, 419 U.S. 565, 579 (1975)).
>
> [11] Contrary to the state's concerns, our decision today does not affect the validity of the Davis-Bacon Act, 40 U.S.C. §§ 276a *et seq.*, upon which the California law was patterned, because the Davis-Bacon Act provides for an extensive hearing and appeal structure through its implementing regulations. Within 30 days after a withholding, either the prime contractor or the subcontractor may request an administrative hearing to review the findings of the Administrator of the Wage and Hour Division of the Department of Labor. 29 C.F.R. § 5.11. The findings and rulings of the administrator may be appealed to an administrative law judge ("ALJ"), whose decision may be appealed to the Wage Appeals Board. *Id.* Ultimately, the Board's decision may be appealed to the federal court. 5 U.S.C. § 704.

(6) Page 598, footnote 9, second paragraph – delete paragraph beginning "Moreover, even if *Parratt* and *Hudson* were" and ending "have no such independent right" and substitute in its place:

Moreover, we doubt the viability of a subcontractor's hypothetical suit against a prime contractor based on theories of breach of the covenant of good faith and fair dealing or equitable subrogation. The state and amici curiae have been unable to cite a single California case utilizing either theory in this context. The prime contractor could easily defeat any breach of covenant suit by demonstrating that its withholding of payment was authorized by law. *See* § 1729. And the facts of this case clearly do not meet the traditional elements of equitable subrogation. *See Caito v. United California Bank*, 576 P.2d 466, 471 (Cal. 1978).

OPINION

HAWKINS, Circuit Judge:

This case requires us to decide whether certain California Labor Code provisions, authorizing the state to seize money and impose penalties for a subcontractor's failure to comply with prevailing wage requirements, violate the Due Process Clause of the Fourteenth Amendment because no notice or hearing is required before such adverse action is taken. Specifically, Victoria L. Bradshaw, Labor Commissioner of the State of California, and others appeal the district court's order granting summary judgment in favor of G & G Fire Sprinklers, Inc. ("G & G"), the public works subcontractor here, and permanently enjoining Bradshaw from enforcing California Labor Code §§ 1727, 1730-33, 1775, 1776(g) and 1813 against G & G for alleged violations of California prevailing wage laws. We hold that G & G has standing to maintain this action and that due process requires either a pre- or post-

deprivation hearing, but that the district court's injunction should be narrowed to apply only until such time as the state may adopt by regulation or otherwise appropriate procedures affording such hearings.

I. Facts

A. *The Parties*

Appellee G & G is a fire protection company that installs fire sprinkler systems. G & G has performed numerous public works projects as a contractor or subcontractor. Appellants are the California Division of Labor Standards Enforcement ("DLSE"), Department of Industrial Relations, and officials thereof (collectively "the state").

B. *The California Labor Code*

The California Labor Code requires contractors and subcontractors on public works projects to pay a state-determined prevailing wage to all their workers. Cal. Lab. Code § 1771. To enforce this requirement, the body awarding the contract ("the awarding body") is allowed to withhold funds from a prime contractor should it determine that the contractor or one of its subcontractors has violated the prevailing wage law. § 1727. The state is authorized to withhold an amount equal to the total amount that all the workers have been underpaid, as well as up to $50 per day, per worker in fines for each instance in which the contractor fails to pay the prevailing wage. § 1775. A withholding order can only be issued after a full investigation by DLSE or the awarding body, unless

the withholding is from the final payment to be made to the prime contractor. § 1727. If the violator is a subcontractor, the prime contractor is authorized to withhold an equivalent amount from its payments to the subcontractor. § 1729. All of these provisions must be incorporated into all public works contracts. Cal. Admin. Code, Title 8, § 16430.

A notice to withhold to an awarding body is a standard procedure utilized by DLSE, but no notice or hearing is required prior to its issuance. DLSE is not required to produce any evidence of a violation of the law, no specific standard is applied in determining whether to issue a notice to withhold, and no procedure exists to guard against the issuance of improper or excessive notices to withhold. Moreover, while DLSE has no formal procedures for conducting investigations, as a general rule, information from a witness/informant must be verified with an independent source. In addition, recommendations to withhold must be reviewed by a supervisor.

The exclusive remedy after withholding is a lawsuit by the prime contractor against the awarding body for recovery of the money withheld. §§ 1730-33. Such a suit must be filed within 90 days of the withholding, and the contractor bears the burden of establishing that there was no violation. § 1733. DLSE may defend the lawsuit upon request by the awarding body. *Id.* Subcontractors are not given the right to bring suit, although a prime contractor is allowed to assign its right to sue. *Id.* If a suit is not brought within 90 days, the state disburses the withheld funds to the underpaid workers; if a suit is brought within this period, then the money is held in escrow until its resolution. § 1731.

C. *The Dispute*

This case arose when DLSE issued three withholding notices against G & G for a total of at least $120,000. The notices were for three separate projects on which G & G had served as a subcontractor.[1] The awarding bodies for each of the projects have withheld money from the prime contractors, who in turn have withheld payment from G & G. No evidence in the record explains in detail the basis for the state's decision to withhold funds from G & G.

The issuance of the notices to withhold has a substantial detrimental effect on G & G's ability to do business, as their effect is to reduce, or cut off, payments for work performed and to damage G & G's reputation in the industry. Inasmuch as G & G intends to perform further public works projects in the future, the issuance of additional improper notices to withhold also could impair G & G's cash flow and ability to do business.

G & G filed this action for declaratory and injunctive relief, claiming that the issuance of the notices to withhold without a prior hearing constitutes a deprivation of property without due process of law in violation of the Fourteenth Amendment. The state responded with a motion to dismiss, and G & G later filed a motion for summary judgment. The district court granted G & G's motion for summary judgment and denied the state's motion to dismiss. The district court's judgment declares

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[1] Withholding notices had also been issued on projects on which G & G had served as the prime contractor, but those notices were withdrawn before this suit ensued.

sections 1727, 1730-33, 1775, 1776(g) and 1813 of the California Labor Code and the state's practices thereunder unconstitutional and enjoins the state from enforcing these sections against G & G.

II. Standing

We first address whether G & G has standing to maintain this action.[2] The state argues G & G does not have standing because subcontractors lack privity of contract with the state under the Labor Code and because the state withheld monies from the prime contractors, not G & G, thus precluding any direct causal connection between G & G's alleged injury and the state's conduct.

Standing is a question of law that we review de novo. *Sahni v. American Diversified Partners*, 83 F.3d 1054, 1056 (9th Cir. 1996). To establish standing, a federal plaintiff must show (1) an injury in fact; (2) a causal connection

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[2] We note at the outset that whether a party has standing is a separate question from whether a party has an interest protected by the Due Process Clause – here, a property interest. "Standing to bring a state court claim of deprivation of property rights does not establish a protected property interest." *Kim Constr. Co. v. Board of Trustees*, 14 F.3d 1243, 1249 (7th Cir. 1994). Moreover, that a party has no constitutionally protected property interest under a statute does not mean that it has no standing to bring a claim under that statute. *See id.*

Accordingly, cases such as *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980), and *San Bernardino Physicians' Servs. Med. Group, Inc. v. County of San Bernardino*, 825 F.2d 1404 (9th Cir. 1987), which the state cites to argue that G & G has no standing, are inapposite because they address whether parties have protectible property interests, not standing.

between the injury and the conduct complained of; and (3) that it is likely, as opposed to speculative, that the injury will be redressed by favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

To establish injury in fact, a plaintiff must demonstrate that the injury is "concrete and particularized" and that it is "actual or imminent, not conjectural or hypothetical." *Id.* at 560. The injury here is both concrete and actual. As a result of the state's withholding procedures, G & G has not been paid approximately $120,000, to which it claims it is entitled. G & G meets the first requirement for standing.

A plaintiff must also show that the injury "fairly can be traced to the challenged action of the defendant" and that it does not result "from the independent action of some third party not before the court." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). The Supreme Court detailed the methodology to be followed in determining causation in a case of this type:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of the facts that must be averred (at the summary judgment stage) . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment . . . will redress it. When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability

> ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction . . . it becomes the burden of the plaintiff to adduce facts showing that those choices [of the third party] have been or will be made in such manner as to produce causation and permit redressability of injury.

Lujan, 504 U.S. at 561-62 (emphasis in original).

The state contends that G & G cannot establish causation because this case involves the state's regulation of a third party, the prime contractors, whose own independent choices are an intervening cause of G & G's injury. Specifically, the state cites California Labor Code § 1729, which states that "[i]t shall be *lawful* for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him" (emphasis added), in support of its argument that the prime contractors were not required to withhold money from G & G and that their decision to do so was the true cause of G & G's injury.

This argument elevates form over substance. The state's action here is targeted at G & G; the prime contractors' only role in the dispute is that of a conduit, not some third party whose independent choices caused G & G's injury. The state investigated *G & G*'s conduct, not the prime contractors', and the withholding notices explicitly named G & G as the violator of the California Labor Code. G & G was clearly the "object of the action" as the Supreme Court used the term. As such, the state's conduct is the cause of G & G's injury: the money would not

have been withheld but for the state's actions.[3] That was the intended result of the state's action, in accordance with the overarching purpose of its regulatory scheme to ensure that prime contractors and subcontractors pay their workers the state-determined prevailing wage.

Even if we somehow assume that G & G is not itself the object of the action, but is indirectly affected by the state's regulation of the prime contractors, our conclusion would be the same. That the harm to G & G may have resulted indirectly does not in itself preclude standing. As the Supreme Court stated in *Warth v. Seldin*, 422 U.S. at 505:

> When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights.

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[3] This case differs from those in which the Supreme Court has found the requisite "but for" causation lacking. *See, e.g., Asarco, Inc. v. Kadish*, 490 U.S. 605 (1989) (individual taxpayers and teachers' organization lacked standing to challenge Arizona land management statute when only alleged injuries were increased taxes and reduced school funding because of impossibility of showing statute had direct causal impact on taxes or school funding); *Simon*, 426 U.S. at 26 (plaintiffs lacked standing to sue due to inability to establish causal relationship between IRS ruling and hospitals' decisions not to provide treatment); *Warth v. Seldin*, 422 U.S. 490 (1975) (plaintiffs asserting inability to find homes in city based on exclusionary zoning practices failed to establish causation).

Furthermore, G & G can show that the prime contractors' (third party) choices "have been or will be made in such a manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562. Here, the prime contractors have withheld payment from G & G, completing the causal link between G & G's injury and the state's action and permitting redressability. Accordingly, G & G's injury can be directly traced to the state's conduct and the second requirement for standing is also satisfied.

To meet the third requirement for standing, a plaintiff must show that his injury will be redressed if he prevails in his legal action. In this case, G & G's injury will be redressed by this suit because if G & G prevails, the withheld money will be released to the prime contractors, who will be obligated by contract to pay it to G & G.

That G & G as a subcontractor lacks privity of contract with the state only bolsters our conclusion. Under California's Labor Code, subcontractors cannot sue the state for withholding funds; only prime contractors can. A subcontractor theoretically could sue the prime contractor, but the latter has a defense of withholding the funds pursuant to state law. In addition, the Labor Code does not grant subcontractors the right to any type of hearing to contest a withholding. Therefore, if a prime contractor chooses not to contest a withholding or to assign its rights to sue to the subcontractor, the subcontractor is left holding a quite empty bag.[4]

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[4] The state cites *Lloyd v. Stewart & Nuss, Inc.*, 327 F.2d 642, 645-46 (9th Cir. 1964), for the proposition that a subcontractor has no property right to funds withheld by an awarding body and hence has no standing to challenge such a withholding. We reject this argument for several reasons.

First, *Lloyd* is a bankruptcy case holding that amounts withheld from a prime contractor by the state upon request of a trucking service doing work for a subcontractor did not constitute property owned or possessed by the debtor subcontractor and hence the bankruptcy court had no summary jurisdiction over the property. The case does not even involve constitutional issues, let alone due process concerns, and it never discusses standing. Second, even if we were to deem *Lloyd* remotely relevant to this case, its decision that the subcontractor debtor had no property right in the debt owed to the prime contractor by the state sheds no light on whether a subcontractor has a protectible property interest in wages withheld from it pursuant to state law. In fact, *Lloyd* acknowledges that the subcontractor and the trucking service "both possessed the right to claim against the fund, but only in the event they were not paid by their respective principal obligors." *Id.* at 646. Here, G & G was not paid by its respective principal obligor, the prime contractor, and it is asking for an opportunity to contest that deprivation.

G & G has standing to maintain this suit.

III. Due Process Claim

A due process claim has two elements: (1) a deprivation of a protectible interest, and (2) denial of adequate procedural protections. *See Goldberg v. Kelly*, 397 U.S. 254 (1970). We consider each of these elements in turn.

A. *Protectible Interest*

To determine whether G & G has suffered a deprivation of a protectible interest, we must evaluate (1) what type of interest has been deprived, and (2) whether that

interest is protected by the Due Process Clause. *Board of Regents of State Colleges v. Roth*, 408 U.S. 569-70 (1972). G & G's interest arises from its public works contract; it has a property interest in being paid in full for the construction work it has completed. *See Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969) (holding that Wisconsin's garnishment procedure allowing wages to be frozen upon request of creditor's lawyer constituted "obvious" deprivation of property). The state's withholding of over $120,000 has deprived G & G of its interest in full payment for services rendered.

The state quite properly notes, however, that not all property interests are protected by the Due Process Clause. While both federal and California law recognize that a contract with the state can create a constitutionally protected property interest, *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Walker v. Northern San Diego County Hosp. Dist.*, 185 Cal. Rptr. 617, 620 (1982), not all public contracts give rise to a protectible due process interest. *See San Bernardino Physicians' Servs. Med. Group, Inc.*, 825 F.2d at 1408. Indeed, because any breach of contract claim against the state logically can be construed as a due process claim, " 'we must bear in mind that the Fourteenth Amendment was not intended to shift the whole of the public law of the states into the federal courts.' " *Id.* (quoting *Brown v. Brienen*, 722 F.2d 360, 364 (7th Cir. 1983)).

> Even though every contract may confer some legal rights under state law, that fact alone need not place all contracts within federal due process protection. Although the underlying substantive interest is created by an independent source such as state law, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause.

Id. at 1408-09 (internal quotations omitted).

Drawing on these principles, the state asserts that because the withholding procedure at issue is contained in G & G's contract, this case is nothing more than a contractual dispute that does not rise to the level of a constitutional claim. Moreover, the state argues that construing this case to present a constitutional claim would result in the "federalization" of state contract law by giving G & G and all others who contract with the state an opportunity to have their grievances reviewed in federal court when they should be confined to their contractually bargained-for remedies under state law. This argument, however, misses the mark. Unlike the cases cited by the state, this case does not involve a breach of contract claim or a challenge to the contract itself.[5] G & G

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[5] All the cases cited by the state to support its argument that G & G's interest is not constitutionally protected involve due process claims arising from an alleged breach of contract. *See, e.g., Unger v. National Residents Matching Program*, 928 F.2d 1392, 1399 (3d Cir. 1991) (termination of residency program after plaintiff's acceptance into program failed to implicate due process rights because contract with university hospital did not confer protected status and did not include provision of for-cause termination only); *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 968-69 (2d Cir. 1988) (contractor alleging state breached contract by withholding funds pending result of criminal investigation failed to establish due process claim because neither contract nor state law contained for-cause termination provision or right to prompt payment); *San*

concedes that the express terms of the contract grant the state the authority to withhold funds for wage violations; the withholding is not a breach of contract.[6] Instead, G & G challenges the constitutionality of several provisions of the California Labor Code as violative of its federal due process rights.[7] Those provisions, incorporated by state law into all public works contracts, authorize the state to withhold payment of money owed to contractors or subcontractors for alleged violations of the state prevailing wage law. This case thus involves a direct constitutional challenge to the state's regulatory power as embodied in these statutes, not a mere contractual dispute.

The state, relying on *O'Bannon*, 447 U.S. at 773, also contends that G & G's property interest is not protectible because this case involves the indirect effects of state action. In *O'Bannon*, the Supreme Court reiterated the principle that "the due process provision of the Fifth Amendment does not apply to the indirect adverse effects

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Bernardino Physicians' Servs. Med. Group, Inc., 825 F.2d at 1406 (physicians' group's challenge to termination of service contract with state did not implicate due process interest because status of employees depended entirely upon their contracts with group, not upon contracts between group and state).

[6] G & G points out that a prime contractor has none of the usual breach of contract remedies. It may not declare a material breach by the awarding body for withholding payments and it may not rescind the contract. The prime contractor must continue to perform, to pay for labor and materials, even if payments have been cut off. The exclusive remedy is a lawsuit. Cal. Labor Code §§ 1731-33.

[7] G & G's complaint seeks declaratory relief from the "facial unconstitutionality of state laws."

of governmental action." 447 U.S. at 789. Specifically, the Court held that residents of a nursing home that had its license revoked did not have a right to a hearing because the revocation "did not directly affect the patients' legal rights or deprive them of any constitutionally protected interest in life, liberty, or property." *Id.* at 790. It further stated, "[T]he fact that the decertification of a home may lead to severe hardship for some of its elderly residents does not turn the decertification into a governmental decision to impose that harm." *Id.* at 789. In a footnote, however, the Court expressly noted:

> We of course need not and do not hold that a person may never have a right to a hearing before his interests may be indirectly affected by government action. Conceivably, for example, if the Government were acting against one person for the purpose of punishing or restraining another, the indirectly affected individual might have a constitutional right to some sort of hearing. But in this case the Government is enforcing its regulations against the home for the benefit of the patients as a whole and the home itself has a strong financial incentive to contest its enforcement decision; under these circumstances the parties suffering an indirect adverse effect clearly have no constitutional right to participate in the enforcement proceedings.

Id. at n.22.

The state's reliance on *O'Bannon* is misplaced.[8] Unlike the nursing home residents in that case, G & G is

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[8] The other cases cited by the state are similarly inapposite. *See Castaneda v. United States Dept. of Agric.*, 807 F.2d 1478 (9th Cir. 1987) (employee of convenience store who was fired after

the target of the state's action here. Hence there is no "indirect" governmental action despite the presence of the prime contractors in the chain of causation. Even if we were to accept the state's contention that its withholding of funds constitutes indirect action, such action would fall within the category expressly left open by the *O'Bannon* Court – action taken by the government against one party for the purpose of punishing or restraining another. Either way, we hold that G & G has suffered a deprivation of a protectible property interest as a result of the state's action.

B. *Process Due*

We now examine whether the state accorded G & G due process when it effected this deprivation. As a general rule, the Due Process Clause requires that individuals receive notice and a meaningful opportunity to be heard *before* the government deprives them of property. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993). Twenty five years ago, the Supreme Court announced an exception to this rule for "extraordinary situations where some valid governmental interest is at stake." *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971)). More

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store was disqualified from food stamp program did not have right to hearing even though employee's fraudulent conduct was cause of termination); *Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982), *aff'd*, 465 U.S. 555 (1984) (students of college that refused to comply with requirements of federal student aid program did not have right to hearing before college's eligibility to receive student aid was revoked).

recently, the Court has refined the exception: "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988). Over the years, the Court has broadened this exception considerably, frequently holding a post-deprivation hearing to be sufficient. *Compare Board of Regents*, 408 U.S. at 570 n.7 (describing use of exception as "rare"), *with e.g., Barry v. Barchi*, 443 U.S. 55 (1979) (holding that state's interest in preserving integrity of sport of horse racing justifies lack of pre-deprivation hearing), *and Mallen*, 486 U.S. 230 (holding that state's interest in maintaining public confidence in bank management justifies post-deprivation hearing for removal of bank manager).

Where extraordinary circumstances justify dispensing with a pre-deprivation hearing, however, a prompt post-deprivation hearing must be provided. *See Mallen*, 486 U.S. at 242. In determining whether a post-deprivation hearing procedure is reasonably prompt, a court should "examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." *Id.*

Here, we have no doubt that the state's interest in ensuring the payment of prevailing wages is sufficiently "important," *see Mallen*, 486 U.S. at 240, to justify the withholding of funds pending the outcome of whatever

kind of hearing may be afforded. Whether a hearing is before or after the giving of notice or the actual withholding is a matter for the state to determine on the basis of the practical considerations involved. *See, e.g., Gilbert v. Homar*, 117 S. Ct. 1807, 1812 (1997) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

In this case, however, subcontractors like G & G are afforded neither a pre- nor post-deprivation hearing when payments are withheld. Once the state determines that a violation of the prevailing wage law has occurred, it may withhold and disburse money directly to the workers and may impose fines both without providing any hearing at which the subcontractor might challenge the validity of the state's finding. Accordingly, subcontractors have no opportunity to be heard at a meaningful time in a meaningful manner. *See Fuentes*, 407 U.S. at 80. This scheme violates the Due Process Clause of the Fourteenth Amendment.[9]

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[9] Cal. Lab. Code §§ 1730-33. The state's argument that due process is satisfied because an aggrieved party may bring a suit on the contract is unavailing. The state relies on *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986), and *Hudson v. Palmer*, 468 U.S. 517 (1984), which held that in certain circumstances, a post-deprivation remedy under state law may fulfill the requirements of due process. We have stated, however, that "[w]e apply *Parratt* and *Hudson* only when the state administrative machinery did not and could not have learned of the deprivation until after it occurred, not when state officials acted pursuant to state policy and followed state procedures they believed were proper." *Knudson v. City of Ellensburg*, 832 F.2d 1142, 1149 (9th Cir. 1987) (internal quotations omitted). There is no question here, and the state does not contest, that the officials

Although the decision as to what specific type of hearing will be afforded subcontractors may depend upon the factual circumstances, the state must, upon determining that a subcontractor has failed to pay prevailing wages, provide the contractor with a reasonably prompt hearing of some sort.[10] Pending the outcome of such a hearing, the state may withhold payments and penalty funds.[11]

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in this case acted pursuant to state policy and followed state procedures. Thus, Knudson forecloses the state's argument.

Moreover, we doubt the viability of a subcontractor's hypothetical suit against a prime contractor based on theories of breach of the covenant of good faith and fair dealing or equitable subrogation. The state and amici curiae have been unable to cite a single California case utilizing either theory in this context. The prime contractor could easily defeat any breach of covenant suit by demonstrating that its withholding of payment was authorized by law. *See* § 1729. And the facts of this case clearly do not meet the traditional elements of equitable subrogation. *See Caito v. United California Bank*, 576 P.2d 466, 471 (Cal. 1978).

[10] The question of when a post-deprivation hearing is adequate is separate from the question of what constitutes a sufficient post-deprivation procedure. The Supreme Court has made it clear that no single model is required in all cases, but that the nature of the deprivation and the other underlying circumstances dictate how much process is due. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978); *Goss v. Lopez*, 419 U.S. 565, 579 (1975)).

[11] Contrary to the state's concerns, our decision today does not affect the validity of the Davis-Bacon Act, 40 U.S.C. §§ 276a *et seq.*, upon which the California law was patterned, because the Davis-Bacon Act provides for an extensive hearing and appeal structure through its implementing regulations. Within 30 days after a withholding, either the prime contractor or the

IV. Other Issues Raised by the State

The state asserts that G & G's summary judgment motion was premature and hence should have been denied. Federal Rule of Civil Procedure 56(a) allows a motion for summary judgment to be made any time more than twenty days after commencement of the action. G & G's motion complied with this rule and with the notice requirements under Local Rule 7.4.[12] Moreover, the state did not file a Rule 56(f) declaration indicating why it needed discovery and the facts it hoped to discover. Given the state's receipt of adequate notice and an opportunity to respond to the motion, and its failure to file a Rule 56(f) declaration, the district court did not err in considering the summary judgment motion.

The state also contends that the individual defendants in this case are entitled to qualified immunity. "Qualified immunity is an affirmative defense to *damage liability*; it does not bar actions for declaratory or injunctive relief." *American Fire, Theft & Collision Managers, Inc. v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991) (internal

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subcontractor may request an administrative hearing to review the findings of the Administrator of the Wage and Hour Division of the Department of Labor. 29 C.F.R. § 5.11. The findings and rulings of the administrator may be appealed to an administrative law judge ("ALJ"), whose decision may be appealed to the Wage Appeals Board. *Id.* Ultimately, the Board's decision may be appealed to the federal court. 5 U.S.C. § 704.

[12] G & G points out that it had filed essentially the same motion in a prior case, relying on the same authorities cited here. Thus, the state was aware of G & G's argument and the authorities on which it relied.

quotation omitted) (emphasis added). Therefore, the individual defendants cannot claim qualified immunity as an affirmative defense to this action seeking declaratory and injunctive relief.

In addition, the district court did not err in denying the state's motion to dismiss. The state asserts that defects on the face of the complaint mandated its dismissal, but these alleged defects relate to issues such as standing, whether G & G was deprived of any constitutional right, and the qualified immunity defense. To the extent that we have decided all of these issues in G & G's favor, we affirm the district court's decision.

V. The Injunction

The district court's judgment declared seven separate provisions of the California Labor Code unconstitutional and enjoined the state from enforcing any of those provisions against G & G. The state argues that the injunction is overbroad, and we agree.

When a federal court holds that a constitutional violation has occurred, the nature of the remedy it grants must be determined by the nature and the scope of the constitutional violation. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977); *see also Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established. . . . "). In devising a remedy for constitutional violations by state agencies or officials, the court "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Id.*

The district court's injunction here was overbroad in two respects. First, by invalidating *all* California Labor Code provisions relating to the withholding procedure, the district court created a remedy beyond what was required to address the constitutional violation – the state's failure to provide subcontractors like G & G a pre- or post-deprivation hearing as required by the Due Process Clause. Declaring the withholding provisions to be unconstitutional *as applied* is sufficient relief, as it allows the state to remedy the violation by adopting regulations providing for a pre- or post-deprivation hearing and to manage its own affairs in a manner consistent with the Constitution. *See Milliken*, 433 U.S. at 280.

Second, the district court issued a permanent injunction prohibiting the state from enforcing the withholding provisions against G & G. The sweeping nature of this relief suggests that even if the state were to provide G & G with an extensive hearing procedure, it still would be enjoined from penalizing G & G for noncompliance and noncooperation, from obtaining the disputed funds from the awarding body, and from disbursing back wages to underpaid workers even if G & G did not contest the withholding. In short, the district court has simply prohibited the state from enforcing the prevailing wage law against G & G. The appropriate course in this case, given all the circumstances, would be to enjoin the state from enforcing the withholding provisions against G & G unless within a reasonable period it chooses to adopt procedures that afford G & G and others either a pre- or post-deprivation hearing, and to specify the time within which the state must do so.

We vacate the district court's injunction and remand for a modification in the manner stated.

VI. Attorney Fees

In a companion appeal that has been submitted on the briefs and consolidated with this case, the state contests the district court's award of attorney fees to G & G following its grant of a permanent injunction in G & G's favor. Specifically, the state asserts that the district court abused its discretion in (1) determining that G & G was the prevailing party under 42 U.S.C. § 1988; (2) awarding attorney fees in light of G & G's alleged failure to satisfy the applicable criteria for such relief; and (3) awarding attorney fees to G & G for work performed in a previous lawsuit alleging identical claims for relief against the same defendants.

A. *Procedural History*

In December 1994, G & G filed a lawsuit entitled *G & G Fire Sprinklers, Inc. v. Juan Garza et al.*, No. CV-94-8542 R ("the *Garza* lawsuit"). G & G's claims in the *Garza* lawsuit were the same as those presented in this case. The *Garza* lawsuit ended in a settlement agreement providing that G & G could refile the lawsuit if the state took further action against G & G, which is precisely what happened. The state's further action – a subsequent notice to withhold – prompted G & G to file the present action.

After the district court's grant of the injunction, the state filed a motion to stay the judgment in this Court,

which was denied by a motions panel. Next, the district court issued an attorney fees award totaling $25,830.28, which is the subject of this appeal. Subsequently, we reconsidered our previous denial of the motion to stay the judgment, granted a stay pending appeal, and set the case for an early hearing on the merits.

B. *Prevailing Party*

The state argues that G & G is not a prevailing party under 42 U.S.C. § 1988 because while it received the relief it requested – an injunction – the staying of that injunction somehow nullified its legal effect or its mandate that the state alter its unlawful conduct. We reject this argument.

In *Farrar v. Hobby*, the Supreme Court held that to be considered a prevailing party, a plaintiff must "obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement." 506 U.S. 103, 111 (1992) (citations omitted). "In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111-12.

Here, G & G obtained an injunction from the district court, which materially altered the legal relationship between the parties by prohibiting the state from depriving G & G of property without any hearing. Certainly that change benefitted G & G and it is the prevailing party. *See Herrington v. County of Sonoma*, 883 F.2d 739, 744 (9th Cir. 1989) (injunction, which appellate court upheld, rendered

plaintiffs prevailing parties despite vacatur of damage award); *see also Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 543 (3d Cir. 1994) (plaintiff who has received injunctive relief has prevailed for purposes of section 1988). That a stay was issued after the district court's grant of the injunction does not alter G & G's status as the prevailing party in the district court, as the district court's judgment is a statement of the rights of the parties unless and until that judgment is altered by a higher court. We have decided not to do so.

C. *General Award of Fees*

The state also claims that the district court erroneously awarded attorney fees based solely on the declaration of Stephen A. Seideman ("Seideman declaration"), G & G's attorney in the district court.[13] More specifically, the state argues that the Seideman declaration fails to discuss many of the factors discussed in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), to be considered by a district court in awarding attorney fees. These include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment due to acceptance of the case; (5) the customary fee; (6) the contingent or fixed nature of the fee; (7) the limitations imposed by the client or the case; (8) the amount involved and the results obtained;

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[13] The state does not dispute any specific items, such as the services provided or the hourly rate, or the total amount of fees; it simply asserts that G & G's evidence was not sufficient to support an award of fees.

(9) the experience, reputation, and ability; (10) the undesirability of the case; (11) the nature of the professional relationship with the client; and (12) awards in similar cases.

A district court, however, need not discuss each and every factor separately in making its decision. Rather, a strong presumption exists that the lodestar (reasonable number of hours times reasonable hourly rate) represents a reasonable fee, and "many of these factors usually are subsumed" within the lodestar calculation. *Jordan v. Multnomah County*, 815 F.2d 1258, 1262 (9th Cir. 1987) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). Thus, G & G only had to prove that its hourly rate was reasonable and that the total number of hours expended was reasonable. *See Dennis v. Chang*, 611 F.2d 1302, 1308 (9th Cir. 1980) (award of attorney fees properly granted where based solely on skill and experience of counsel, rates of compensation "typical" of those charged by attorneys for comparable service, and reasonable amount of time spent).

Nevertheless, we agree with the state that G & G did not satisfy its "burden of producing satisfactory evidence, *in addition to the affidavits of its counsel*, that the requested rates are in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation." *Jordan*, 815 F.2d at 1263 (emphasis added). The only evidence in the record about the hourly rate is Mr. Seideman's statement in his declaration that "[t]he hourly rates which I billed Plaintiff are equal to or less than those generally billed by attorneys in Los Angeles for similar services," and a similar statement

with regard to the paralegal's hourly rates. These statements constitute an "insufficient basis from which to conclude that the rates requested are 'reasonable.' " *Southerland v. International Longshoremen's and Warehousemen's Union*, 845 F.2d 796, 801 (9th Cir. 1987). Therefore, while G & G certainly is entitled to fees, we remand to the district court the issue of whether the claimed hourly rates are reasonable. On remand, both G & G and the State should be allowed to supplement the record with additional evidence so that the district court can reevaluate the reasonableness of the fees requested.

In addition, we do not find persuasive the state's related argument that the California Division of Labor Standards Enforcement ("DLSE") and the Department of Industrial Relations were not made parties to the present suit until the First Amended Complaint on September 7, 1995 and hence should not be held accountable for any fees incurred prior to that time. We hold that these parties are jointly and severally liable for the fees, given that the work involved aided in the preparation of the case against all the defendants and the case was not one in which the claims against each defendant varied or one defendant was more culpable than another. *See Woods v. Graphic Communications*, 925 F.2d 1195, 1207 (9th Cir. 1991) (defendant liable for fees previously incurred where fees assisted in preparing case against defendant and served as developmental work for case).

D. *Award of Fees for Work Performed in Previous Lawsuit*

The state asserts that the district court should not have allowed G & G to recoup attorney fees from the *Garza* lawsuit given that it did not prevail in that lawsuit. We uphold the district court's decision.

In *Webb v. Board of Educ.*, 471 U.S. 234, 243 (1985), the Supreme Court affirmed a district court's decision to deny attorney fees for time spent pursuing optional administrative remedies, specifically school board proceedings. But the Court noted that the petitioner in that case "made no suggestion below that any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement," *id.*, suggesting that if that had happened, maybe the result would have been different. We followed the Supreme Court's lead in *Rock Creek Ltd. Partnership v. State Water Resources Control Bd.*, 972 F.2d 274, 279 (9th Cir. 1992), holding that a sponsor of a hydroelectric project was not entitled to attorney fees under §§ 1983 and 1988 for administrative proceedings before FERC. We reasoned that the FERC proceeding was not a condition precedent to plaintiff's entry to federal court, nor was it a part of a continuing federal court action. Because the FERC proceeding was not related or dependent, it could not form the basis for attorney fees. *Id.*

Cases from other circuits have addressed similar fee issues in non-administrative contexts. For example, the Third Circuit held in *Keenan v. City of Philadelphia*, 983

F.2d 459, 474 (3d Cir. 1992), that the district court did not abuse its discretion in including the time spent in labor arbitration in its fee calculation. It based its decision on the following interpretation of *Webb* by the Third Circuit: "[F]or the time spent pursuing optional administrative proceedings properly to be included in the calculation of a reasonable attorney's fee, the work must be 'useful and of a type ordinarily necessary' to secure the final result obtained from the litigation." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 561 (1986). In addition, the Eighth Circuit briefly addressed a similar situation in *Perkins v. Cross*, 728 F.2d 1099, 1100 (8th Cir. 1984), an action by picketers against municipal officials for violation of their civil rights. The court held that fees could be awarded for any "time the lawyer spent defending the plaintiffs in the original municipal court proceeding to the extent, if any, that research or investigation done in connection with that proceeding proved directly relevant to the successful prosecution of [their] later civil rights claims." *Id.*

Here, G & G made a showing that the work done in the *Garza* lawsuit was directly related to the present action – the allegations in that suit were identical to those made here. Counsel for G & G stated that the legal research and analysis performed in *Garza* were necessary for this action and accordingly saved him from expending more time on this lawsuit. Thus, unlike the *Rock Creek* case, the prior proceeding here was related to the present action. The two can even be viewed as a continuum of proceedings necessary to achieve the relief finally granted, given that the *Garza* case ended in a settlement stating that if the state took further action, G & G could

refile the lawsuit, which is what happened. Moreover, caselaw reveals no requirement that a party must have prevailed in a prior proceeding to use that as a basis for attorney fees in another action.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART. Costs to Appellee G & G Fire Sprinklers, Inc.

KOZINSKI, Circuit Judge, dissenting.

In *San Bernardino Physicians' Services Medical Group v. County of San Bernardino*, 825 F.2d 1404 (9th Cir. 1987), we held that "[i]t is neither workable nor within the intent of section 1983 to convert every breach of contract claim against a state into a federal claim." *Id.* at 1408 (footnote omitted). While we recognized that any contract with the state gives rise to what could be characterized as a property interest, we held that this alone is not a basis for invoking the protections of due process. Rather, the interest in question must fall within a narrow category that might fairly be characterized as a civil right, *see id.* at 1409, a right in public employment being the quintessential example. *See id.* (citing *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972)). *San Bernardino* said that "construction contracts [and] purely material supply contracts" – contracts like the one we have here – do *not* create rights protected by the due process clause. *Id.* at 1410.

The majority abandons *San Bernardino*'s nuanced framework in favor of a categorical approach that turns every right to receive payment on a public works contract into a property right protected by due process: "G & G's interest arises from its public works contract; it has a property interest in being paid in full for the construction

work it has completed." Maj. op. at 10658. The opinion thus conflicts with *San Bernardino*, as well as the opinions of two other circuits. *See Mid-American Waste Sys., Inc. v. City of Gary*, 49 F.3d 286, 291 (7th Cir. 1995); *Walentas v. Lipper*, 862 F.2d 414, 418 (2d Cir. 1988); *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 966 (2d Cir. 1988).

It is also very bad policy. The state here is engaged in a commercial activity; it holds no special sway over other parties by virtue of its regulatory powers. In carrying out its project, the state has bargained for the construction to be done according to plan, on schedule, and consistent with health and safety codes; these are ordinary terms just like the ones private parties put into their construction contracts. The state has also bargained for a more exotic term, namely that contractors and subcontractors pay a prevailing wage to their employees. While this differs from what ordinarily appears in private construction contracts, it is not an exercise of the state's regulatory power; rather, it is a term that any private party could equally well put into its contract. If the contractor or subcontractor doesn't like the term, he can refuse to do business with the state.[1]

Here the state determined that G & G did not comply with its prevailing wage obligation, and thus withheld payments. This is no different from a builder's refusal to make progress payments when he discovers (or believes he has discovered) a failure of performance on any other term of a standard construction contract – for example,

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[1] That the prevailing wage term appears in the California Labor Code doesn't matter. No one is forced to comply unless he agrees to do business with the state.

that the plumbing isn't up to code. Withholding payments under such circumstances is the standard remedy. Even if the general contractor were to take the position that the subcontractor could not recover from it because of Cal. Labor Code § 1729, *see* maj. op. at 10663 n.9, the subcontractor would be able to proceed against the state. Labor Code § 1733 provides that suit may be brought by the contractor or the contractor's assignee against the awarding body to recover sums withheld. If the contractor refuses to assign its right to sue for the money withheld to the subcontractor, the subcontractor could sue under the theory of equitable subrogation, which the California Supreme Court has held "is broad enough to include every instance in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter." *Caito v. United California Bank*, 20 Cal. 3d 694, 704 (1978) (quoting *Rhine v. Kemmerrer*, 114 Cal. App. 2d 810, 814 (1952)) (internal quotation marks omitted). This is a run-of-the-mill contract dispute just like thousands routinely handled by the state courts without federal intervention.

In lieu of this common sense solution – which also complies with binding precedent – the majority invokes the full panoply of federal due process, including the requirement of a pre-deprivation or prompt (whatever that litigation-inviting term means) post-deprivation hearing, whenever the state wishes to withhold payments for what it believes is defective performance under the contract. While the opinion addresses only the prevailing wage term, its logic carries much farther: If the state discovers any other type of breach – for example, failure

to complete the project on time or to comply with applicable safety codes – it must provide such a hearing as an added price for the standard remedy of withholding payment. This gravely burdens the state's most potent remedy for dealing with recalcitrant contractors and subcontractors. Why the state should be saddled with this yoke when it engages in the purely commercial activity of construction – a burden not suffered by private builders – is beyond me.[2] *San Bernardino* clearly teaches that commercial contract rights must be vindicated in state court using state remedies. By ignoring this teaching the majority creates not just an intra-circuit and inter-circuit conflict but also a wholly unwarranted burden on the thousands of states, counties, cities and special use districts governed by our law. Government is too unwieldy already; there is no justification for adding this heavy layer of red tape. I respectfully dissent.

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[2] We can't always expect the government to act with unbounded compassion, patience and generosity. Indeed, when the government is acting as a commercial entity, taxpayers cajole it to act with all the ferociousness the marketplace demands. Certain limits must always apply: The government cannot, for example, use public works contracts to discriminate on the basis of race or sex. But when the government bargains over the commercial terms of the contract it should enjoy the same ability as private builders to draw up the deal as it likes and seek the best price and the best terms the marketplace allows.

G & G FIRE SPRINKLERS, INC.,

Plaintiff-Appellee,

v.

VICTORIA L. BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California,

Defendants-Appellants.

No. 96-55194
D.C. No.
CV-95-004839-R

Appeals from the United States District Court
for the Central District of Califorina
Manuel L. Real, Chief District Judge, Presiding

No. 95-56639
Agrued and Submitted
May 7, 1996 – Pasadena, California

No. 96-55194
Submitted August 27, 1997*
Pasadena, California

Filed February 3, 1998

Before: Stephen Reinhardt, Alex Kozinski and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hawkins; Dissent by Judge Kozinski

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OPINION

HAWKINS, Circuit Judge:

This case requires us to decide whether certain California Labor Code provisions, authorizing the state to seize money and impose penalties for a subcontractor's failure to comply with prevailing wage requirements,

*The panel finds this case appropriate for submission without agrument pursuant to Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

violate the Due Process Clause of the Fourteenth Amendment because no notice or hearing is required before such adverse action is taken. Specifically, Victoria L. Bradshaw, Labor Commissioner of the State of California, and others appeal the district court's order granting summary judgment in favor of G & G Fire Sprinklers, Inc. ("G & G"), the public works subcontractor here, and permanently enjoining Bradshaw from enforcing California Labor Code §§ 1727, 1730-33, 1775, 1776(g) and 1813 against G & G for alleged violations of California prevailing wage laws. We hold that G & G has standing to maintain this action and that due process requires either a pre- or post-deprivation hearing, but that the district court's injunction should be narrowed to apply only until such time as the state may adopt by regulation or otherwise appropriate procedures affording such hearings.

I. Facts

A. *The Parties*

Appellee G & G is a fire protection company that installs fire sprinkler systems. G & G has performed numerous public works projects as a contractor or subcontractor. Appellants are the California Division of Labor Standards Enforcement ("DLSE"), Department of Industrial Relations, and officials thereof (collectively "the state").

B. *The California Labor Code*

The California Labor Code requires contractors and subcontractors on public works projects to pay a state-determined prevailing wage to all their workers. Cal.

Lab.Code § 1771. To enforce this requirement, the body awarding the contract ("the awarding body") is allowed to withhold funds from a prime contractor should it determine that the contractor or one of its subcontractors has violated the prevailing wage law. § 1727. The state is authorized to withhold an amount equal to the total amount that all the workers have been underpaid, as well as up to $50 per day, per worker in fines for each instance in which the contractor fails to pay the prevailing wage. § 1775. A withholding order can only be issued after a full investigation by DLSE or the awarding body, unless the withholding is from the final payment to be made to the prime contractor. § 1727. If the violator is a subcontractor, the prime contractor is authorized to withhold an equivalent amount from its payments to the subcontractor. § 1729. All of these provisions must be incorporated into all public works contracts. Cal. Admin. Code, Title 8, § 16430.

A notice to withhold to an awarding body is a standard procedure utilized by DLSE, but no notice or hearing is required prior to its issuance. DLSE is not required to produce any evidence of a violation of the law, no specific standard is applied in determining whether to issue a notice to withhold, and no procedure exists to guard against the issuance of improper or excessive notices to withhold. Moreover, while DLSE has no formal procedures for conducting investigations, as a general rule, information from a witness/informant must be verified with an independent source. In addition, recommendations to withhold must be reviewed by a supervisor.

The exclusive remedy after withholding is a lawsuit by the prime contractor against the awarding body for

recovery of the money withheld. §§ 1730-33. Such a suit must be filed within 90 days of the withholding, and the contractor bears the burden of establishing that there was no violation. § 1733. DLSE may defend the lawsuit upon request by the awarding body. *Id.* Subcontractors are not given the right to bring suit, although a prime contractor is allowed to assign its right to sue. *Id.* If a suit is not brought within 90 days, the state disburses the withheld funds to the underpaid workers; if a suit is brought within this period, then the money is held in escrow until its resolution. § 1731.

C. *The Dispute*

This case arose when DLSE issued three withholding notices against G & G for a total of at least $120,000. The notices were for three separate projects on which G & G had served as a subcontractor.[1] The awarding bodies for each of the projects have withheld money from the prime contractors, who in turn have withheld payment from G & G. No evidence in the record explains in detail the basis for the state's decision to withhold funds from G & G.

The issuance of the notices to withhold has a substantial detrimental effect on G & G's ability to do business, as their effect is to reduce, or cut off, payments for work performed and to damage G & G's reputation in the industry. Inasmuch as G & G intends to perform further

[1] Withholding notices had also been issued on projects on which G & G had served as the prime contractor, but those notices were withdrawn before this suit ensued.

public works projects in the future, the issuance of additional improper notices to withhold also could impair G & G's cash flow and ability to do business.

G & G filed this action for declaratory and injunctive relief, claiming that the issuance of the notices to withhold without a prior hearing constitutes a deprivation of property without due process of law in violation of the Fourteenth Amendment. The state responded with a motion to dismiss, and G & G later filed a motion for summary judgment. The district court granted G & G's motion for summary judgment and denied the state's motion to dismiss. The district court's judgment declares sections 1727, 1730-33, 1775, 1776(g) and 1813 of the California Labor Code and the state's practices thereunder unconstitutional and enjoins the state from enforcing these sections against G & G.

II. Standing

We first address whether G & G has standing to maintain this action.[2] The state argues G & G does not

[2] We note at the outset that whether a party has standing is a separate question from whether a party has an interest protected by the Due Process Clause – here, a property interest. "Standing to bring a state court claim of deprivation of property rights does not establish a protected property interest." *Kim Constr. Co. v. Board of Trustees*, 14 F.3d 1243, 1249 (7th Cir. 1994). Moreover, that a party has no constitutionally protected property interest under a statute does not mean that it has no standing to bring a claim under that statute. *See id.*

Accordingly, cases such as *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980), and *San Bernardino Physicians' Servs. Med. Group, Inc. v. County of San Bernardino*, 825 F.2d 1404 (9th

have standing because subcontractors lack privity of contract with the state under the Labor Code and because the state withheld monies from the prime contractors, not G & G, thus precluding any direct causal connection between G & G's alleged injury and the state's conduct.

Standing is a question of law that we review de novo. *Sahni v. American Diversified Partners*, 83 F.3d 1054, 1056 (9th Cir. 1996). To establish standing, a federal plaintiff must show (1) an injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) that it is likely, as opposed to speculative, that the injury will be redressed by favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

To establish injury in fact, a plaintiff must demonstrate that the injury is "concrete and particularized" and that it is "actual or imminent, not conjectural or hypothetical." *Id.* at 560. The injury here is both concrete and actual. As a result of the state's withholding procedures, G & G has not been paid approximately $120,000, to which it claims it is entitled. G & G meets the first requirement for standing.

A plaintiff must also show that the injury "fairly can be traced to the challenged action of the defendant" and that it does not result "from the independent action of some third party not before the court." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). The

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Cir. 1987), which the state cites to argue that G & G has no standing, are inapposite because they address whether parties have protectible property interests, not standing.

Supreme Court detailed the methodology to be followed in determining causation in a case of this type:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of the facts that must be averred (at the summary judgment stage) . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment . . . will redress it. When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction . . . it becomes the burden of the plaintiff to adduce facts showing that those choices [of the third party] have been or will be made in such manner as to produce causation and permit redressability of injury.

Lujan, 504 U.S. at 561-62 (emphasis in original).

The state contends that G & G cannot establish causation because this case involves the state's regulation of a third party, the prime contractors, whose own independent choices are an intervening cause of G & G's injury. Specifically, the state cites California Labor Code § 1729, which states that "[i]t shall be *lawful* for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him" (emphasis added), in support of its argument that the prime contractors were not required to withhold money

from G & G and that their decision to do so was the true cause of G & G's injury.

This argument elevates form over substance. The state's action here is targeted at G & G; the prime contractors' only role in the dispute is that of a conduit, not some third party whose independent choices caused G & G's injury. The state investigated G & G's conduct, not the prime contractors', and the withholding notices explicitly named G & G as the violator of the California Labor Code. G & G was clearly the "object of the action" as the Supreme Court used the term. As such, the state's conduct is the cause of G & G's injury: the money would not have been withheld but for the state's actions.[3] That was the intended result of the state's action, in accordance with the overarching purpose of its regulatory scheme to ensure that prime contractors and subcontractors pay their workers the state-determined prevailing wage.

Even if we somehow assume that G & G is not itself the object of the action, but is indirectly affected by the state's regulation of the prime contractors, our conclusion

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[3] This case differs from those in which the Supreme Court has found the requisite "but for" causation lacking. *See, e.g., ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989) (individual taxpayers and teachers' organization lacked standing to challenge Arizona land management statute when only alleged injuries were increased taxes and reduced school funding because of impossibility of showing statute had direct causal impact on taxes or school funding); *Simon*, 426 U.S. at 26 (plaintiffs lacked standing to sue due to inability to establish causal relationship between IRS ruling and hospitals' decisions not to provide treatment); *Warth v. Seldin*, 422 U.S. 490 (1975) (plaintiffs asserting inability to find homes in city based on exclusionary zoning practices failed to establish causation).

would be the same. That the harm to G & G may have resulted indirectly does not in itself preclude standing. As the Supreme Court stated in *Warth v. Seldin*, 422 U.S. at 505:

> When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights.

Furthermore, G & G can show that the prime contractors' (third party) choices "have been or will be made in such a manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562. Here, the prime contractors have withheld payment from G & G, completing the causal link between G & G's injury and the state's action and permitting redressability. Accordingly, G & G's injury can be directly traced to the state's conduct and the second requirement for standing is also satisfied.

To meet the third requirement for standing, a plaintiff must show that his injury will be redressed if he prevails in his legal action. In this case, G & G's injury will be redressed by this suit because if G & G prevails, the withheld money will be released to the prime contractors, who will be obligated by contract to pay it to G & G.

That G & G as a subcontractor lacks privity of contract with the state only bolsters our conclusion. Under California's Labor Code, subcontractors cannot sue the state for withholding funds; only prime contractors can. A subcontractor theoretically could sue the prime contractor, but the latter has a defense of withholding the

funds pursuant to state law. In addition, the Labor Code does not grant subcontractors the right to any type of hearing to contest a withholding. Therefore, if a prime contractor chooses not to contest a withholding or to assign its rights to sue to the subcontractor, the subcontractor is left holding a quite empty bag.[4]

G & G has standing to maintain this suit.

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[4] The state cites *Lloyd v. Stewart & Nuss, Inc.*, 327 F.2d 642, 645-46 (9th Cir. 1964), for the proposition that a subcontractor has no property right to funds withheld by an awarding body and hence has no standing to challenge such a withholding. We reject this argument for several reasons.

First, *Lloyd* is a bankruptcy case holding that amounts withheld from a prime contractor by the state upon request of a trucking service doing work for a subcontractor did not constitute property owned or possessed by the debtor subcontractor and hence the bankruptcy court had no summary jurisdiction over the property. The case does not even involve constitutional issues, let alone due process concerns, and it never discusses standing. Second, even if we were to deem *Lloyd* remotely relevant to this case, its decision that the subcontractor debtor had no property right in the debt owed to the prime contractor by the state sheds no light on whether a subcontractor has a protectible property interest in wages withheld from it pursuant to state law. In fact, *Lloyd* acknowledges that the subcontractor and the trucking service "both possessed the right to claim against the fund, but only in the event they were not paid by their respective principal obligors." *Id.* at 646. Here, G & G was not paid by its respective principal obligor, the prime contractor, and it is asking for an opportunity to contest that deprivation.

III. Due Process Claim

A due process claim has two elements: (1) a deprivation of a protectible interest, and (2) denial of adequate procedural protections. *See Goldberg v. Kelly*, 397 U.S. 254 (1970). We consider each of these elements in turn.

A. *Protectible Interest*

To determine whether G & G has suffered a deprivation of a protectible interest, we must evaluate (1) what type of interest has been deprived, and (2) whether that interest is protected by the Due Process Clause. *Board of Regents of State Colleges v. Roth*, 408 U.S. 569-70 (1972). G & G's interest arises from its public works contract; it has a property interest in being paid in full for the construction work it has completed. *See Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969) (holding that Wisconsin's garnishment procedure allowing wages to be frozen upon request of creditor's lawyer constituted "obvious" deprivation of property). The state's withholding of over $120,000 has deprived G & G of its interest in full payment for services rendered.

The state quite properly notes, however, that not all property interests are protected by the Due Process Clause. While both federal and California law recognize that a contract with the state can create a constitutionally protected property interest, *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Walker v. Northern San Diego County Hosp. Dist.*, 185 Cal.Rptr. 617, 620 (1982), not all public contracts give rise to a protectible due process interest. *See San Bernardino Physicians' Servs. Med. Group, Inc.*, 825 F.2d at 1408. Indeed, because any breach of contract claim

against the state logically can be construed as a due process claim, " 'we must bear in mind that the Fourteenth Amendment was not intended to shift the whole of the public law of the states into the federal courts.' " *Id.* (quoting *Brown v. Brienen*, 722 F.2d 360, 364 (7th Cir. 1983)).

> Even though every contract may confer some legal rights under state law, that fact alone need not place all contracts within federal due process protection. Although the underlying substantive interest is created by an independent source such as state law, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause.

Id. at 1408-09 (internal quotations omitted).

Drawing on these principles, the state asserts that because the withholding procedure at issue is contained in G & G's contract, this case is nothing more than a contractual dispute that does not rise to the level of a constitutional claim. Moreover, the state argues that construing this case to present a constitutional claim would result in the "federalization" of state contract law by giving G & G and all others who contract with the state an opportunity to have their grievances reviewed in federal court when they should be confined to their contractually bargained-for remedies under state law. This argument, however, misses the mark. Unlike the cases cited by the state, this case does not involve a breach of

contract claim or a challenge to the contract itself.[5] G & G concedes that the express terms of the contract grant the state the authority to withhold funds for wage violations; the withholding is not a breach of contract.[6] Instead, G & G challenges the constitutionality of several provisions of the California Labor Code as violative of its

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[5] All the cases cited by the state to support its argument that G & G's interest is not constitutionally protected involve due process claims arising from an alleged breach of contract. *See, e.g., Unger v. National Residents Matching Program*, 928 F.2d 1392, 1399 (3d Cir. 1991) (termination of residency program after plaintiff's acceptance into program failed to implicate due process rights because contract with university hospital did not confer protected status and did not include provision of for-cause termination only); *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 968-69 (2d Cir. 1988) (contractor alleging state breached contract by withholding funds pending result of criminal investigation failed to establish due process claim because neither contract nor state law contained for-cause termination provision or right to prompt payment); *San Bernardino Physicians' Servs. Med. Group, Inc.*, 825 F.2d at 1406 (physicians' group's challenge to termination of service contract with state did not implicate due process interest because status of employees depended entirely upon their contracts with group, not upon contracts between group and state).

[6] G & G points out that a prime contractor has none of the usual breach of contract remedies. It may not declare a material breach by the awarding body for withholding payments and it may not rescind the contract. The prime contractor must continue to perform, to pay for labor and materials, even if payments have been cut off. The exclusive remedy is a lawsuit. Cal. Labor Code §§ 1731-33.

federal due process rights.[7] Those provisions, incorporated by state law into all public works contracts, authorize the state to withhold payment of money owed to contractors or subcontractors for alleged violations of the state prevailing wage law. This case thus involves a direct constitutional challenge to these statutes, not a mere contractual dispute.

The state, relying on *O'Bannon*, 447 U.S. at 773, also contends that G & G's property interest is not protectible because this case involves the indirect effects of state action. In *O'Bannon*, the Supreme Court reiterated the principle that "the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action." 447 U.S. at 789. Specifically, the Court held that residents of a nursing home that had its license revoked did not have a right to a hearing because the revocation "did not directly affect the patients' legal rights or deprive them of any constitutionally protected interest in life, liberty, or property." *Id.* at 790. It further stated, "[T]he fact that the decertification of a home may lead to severe hardship for some of its elderly residents does not turn the decertification into a governmental decision to impose that harm." *Id.* at 789. In a footnote, however, the Court expressly noted:

> We of course need not and do not hold that a person may never have a right to a hearing before his interests may be indirectly affected by government action. Conceivably, for example, if the Government were acting against one person

[7] G & G's complaint seeks declaratory relief from the "facial unconstitutionality of state laws."

> for the purpose of punishing or restraining another, the indirectly affected individual might have a constitutional right to some sort of hearing. But in this case the Government is enforcing its regulations against the home for the benefit of the patients as a whole and the home itself has a strong financial incentive to contest its enforcement decision; under these circumstances the parties suffering an indirect adverse effect clearly have no constitutional right to participate in the enforcement proceedings.

Id. at n.22.

The state's reliance on *O'Bannon* is misplaced.[8] Unlike the nursing home residents in that case, G & G is the target of the state's action here. Hence there is no "indirect" governmental action despite the presence of the prime contractors in the chain of causation. Even if we were to accept the state's contention that its withholding of funds constitutes indirect action, such action would fall within the category expressly left open by the *O'Bannon* Court – action taken by the government against one party for the purpose of punishing or restraining another. Either way, we hold that G & G has suffered a

[8] The other cases cited by the state are similarly inapposite. *See Castaneda v. United States Dept. of Agric.*, 807 F.2d 1478 (9th Cir. 1987) (employee of convenience store who was fired after store was disqualified from food stamp program did not have right to hearing even though employee's fraudulent conduct was cause of termination); *Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982), *aff'd*, 465 U.S. 555 (1984) (students of college that refused to comply with requirements of federal student aid program did not have right to hearing before college's eligibility to receive student aid was revoked).

deprivation of a protectible property interest as a result of the state's action.

B. *Process Due*

We now examine whether the state accorded G & G due process when it effected this deprivation. As a general rule, the Due Process Clause requires that individuals receive notice and a meaningful opportunity to be heard *before* the government deprives them of property. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993). Twenty five years ago, the Supreme Court announced an exception to this rule for "extraordinary situations where some valid governmental interest is at stake." *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971)). More recently, the Court has refined the exception: "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988). Over the years, the Court has broadened this exception considerably, frequently holding a post-deprivation hearing to be sufficient. *Compare Board of Regents*, 408 U.S. at 570 n.7 (describing use of exception as "rare"), *with e.g., Barry v. Barchi*, 443 U.S. 55 (1979) (holding that state's interest in preserving integrity of sport of horse racing justifies lack of pre-deprivation hearing), *and Mallen*, 486 U.S. 230 (holding that state's interest in maintaining public confidence in bank management justifies post-deprivation hearing for removal of bank manager).

Where extraordinary circumstances justify dispensing with a pre-deprivation hearing, however, a prompt post-deprivation hearing must be provided. *See Mallen*, 486 U.S. at 242. In determining whether a post-deprivation hearing procedure is reasonably prompt, a court should "examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." *Id.*

In this case, subcontractors like G & G are afforded neither a pre-nor post-deprivation hearing when payments are withheld. Once the state determines that a violation of the prevailing wage law has occurred, it may withhold and disburse money directly to the workers and may impose fines both without providing any hearing at which the subcontractor might challenge the validity of the state's finding. Accordingly, subcontractors have no opportunity to be heard at a meaningful time in a meaningful manner. *See Fuentes*, 407 U.S. at 80. This scheme violates the Due Process Clause of the Fourteenth Amendment.[9]

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[9] Cal. Lab.Code §§ 1730-33. The state's argument that due process is satisfied because an aggrieved party may bring a suit on the contract is unavailing. The state relies on *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986), and *Hudson v. Palmer*, 468 U.S. 517 (1984), which held that in certain circumstances, a post-deprivation remedy under state law may fulfill the requirements of due process. We have stated, however, that "[w]e apply *Parratt* and *Hudson* only when the state

What specific type of process must be afforded subcontractors is for the state to decide. We hold only that the state must provide for either a pre- or prompt post-deprivation hearing when withholding payments and assessing penalties.[10]

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administrative machinery did not and could not have learned of the deprivation until after it occurred, not when state officials acted pursuant to state policy and followed state procedures they believed were proper." *Knudson v. City of Ellensburg*, 832 F.2d 1142, 1149 (9th Cir. 1987) (internal quotations omitted). There is no question here, and the state does not contest, that the officials in this case acted pursuant to state policy and followed state procedures. Thus, Knudson forecloses the state's argument.

Moreover, even if *Parratt* and *Hudson* were applicable, they would not alter our conclusion because only prime contractors are granted the right to bring suit on the contract against the state. Subcontractors may sue only if the prime contractor is willing to assign them its right. Therefore, even if this right to sue could somehow be held to satisfy due process, it would not satisfy due process for the subcontractors who have no such independent right.

[10] Contrary to the state's concerns, our decision today does not affect the validity of the Davis-Bacon Act, 40 U.S.C. §§ 276a *et seq.*, upon which the California law was patterned, because the Davis-Bacon Act provides for an extensive hearing and appeal structure through its implementing regulations. Within 30 days after a withholding, either the prime contractor or the subcontractor may request an administrative hearing to review the findings of the Administrator of the Wage and Hour Division of the Department of Labor. 29 C.F.R. § 5.11. The findings and rulings of the administrator may be appealed to an administrative law judge ("ALJ"), whose decision may be appealed to the Wage Appeals Board. *Id.* Ultimately, the Board's decision may be appealed to the federal court. 5 U.S.C. § 704.

IV. Other Issues Raised by the State

The state asserts that G & G's summary judgment motion was premature and hence should have been denied. Federal Rule of Civil Procedure 56(a) allows a motion for summary judgment to be made any time more than twenty days after commencement of the action. G & G's motion complied with this rule and with the notice requirements under Local Rule 7.4.[11] Moreover, the state did not file a Rule 56(f) declaration indicating why it needed discovery and the facts it hoped to discover. Given the state's receipt of adequate notice and an opportunity to respond to the motion, and its failure to file a Rule 56(f) declaration, the district court did not err in considering the summary judgment motion.

The state also contends that the individual defendants in this case are entitled to qualified immunity. "Qualified immunity is an affirmative defense to *damage liability*; it does not bar actions for declaratory or injunctive relief." *American Fire, Theft & Collision Managers, Inc. v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991) (internal quotation omitted) (emphasis added). Therefore, the individual defendants cannot claim qualified immunity as an affirmative defense to this action seeking declaratory and injunctive relief.

In addition, the district court did not err in denying the state's motion to dismiss. The state asserts that

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[11] G & G points out that it had filed essentially the same motion in a prior case, relying on the same authorities cited here. Thus, the state was aware of G & G's argument and the authorities on which it relied.

defects on the face of the complaint mandated its dismissal, but these alleged defects relate to issues such as standing, whether G & G was deprived of any constitutional right, and the qualified immunity defense. To the extent that we have decided all of these issues in G & G's favor, we affirm the district court's decision.

V. The Injunction

The district court's judgment declared seven separate provisions of the California Labor Code unconstitutional and enjoined the state from enforcing any of those provisions against G & G. The state argues that the injunction is overbroad, and we agree.

When a federal court holds that a constitutional violation has occurred, the nature of the remedy it grants must be determined by the nature and the scope of the constitutional violation. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977); *see also Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established. . . . "). In devising a remedy for constitutional violations by state agencies or officials, the court "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Id.*

The district court's injunction here was overbroad in two respects. First, by invalidating *all* California Labor Code provisions relating to the withholding procedure, the district court created a remedy beyond what was required to address the constitutional violation – the state's failure to provide subcontractors like G & G a pre-

or post-deprivation hearing as required by the Due Process Clause. Declaring the withholding provisions to be unconstitutional *as applied* is sufficient relief, as it allows the state to remedy the violation by adopting regulations providing for a pre- or post-deprivation hearing and to manage its own affairs in a manner consistent with the Constitution. *See Milliken*, 433 U.S. at 280.

Second, the district court issued a permanent injunction prohibiting the state from enforcing the withholding provisions against G & G. The sweeping nature of this relief suggests that even if the state were to provide G & G with an extensive hearing procedure, it still would be enjoined from penalizing G & G for noncompliance and noncooperation, from obtaining the disputed funds from the awarding body, and from disbursing back wages to underpaid workers even if G & G did not contest the withholding. In short, the district court has simply prohibited the state from enforcing the prevailing wage law against G & G. The appropriate course in this case, given all the circumstances, would be to enjoin the state from enforcing the withholding provisions against G & G unless within a reasonable period it chooses to adopt procedures that afford G & G and others either a pre- or post-deprivation hearing, and to specify the time within which the state must do so.

We vacate the district court's injunction and remand for a modification in the manner stated.

VI. Attorney Fees

In a companion appeal that has been submitted on the briefs and consolidated with this case, the state contests the district court's award of attorney fees to G & G following its grant of a permanent injunction in G & G's favor. Specifically, the state asserts that the district court abused its discretion in (1) determining that G & G was the prevailing party under 42 U.S.C. § 1988; (2) awarding attorney fees in light of G & G's alleged failure to satisfy the applicable criteria for such relief; and (3) awarding attorney fees to G & G for work performed in a previous lawsuit alleging identical claims for relief against the same defendants.

A. *Procedural History*

In December 1994, G & G filed a lawsuit entitled *G & G Fire Sprinklers, Inc. v. Juan Garza et al.*, No. CV-94-8542 R ("the *Garza* lawsuit"). G & G's claims in the *Garza* lawsuit were the same as those presented in this case. The *Garza* lawsuit ended in a settlement agreement providing that G & G could refile the lawsuit if the state took further action against G & G, which is precisely what happened. The state's further action – a subsequent notice to withhold – prompted G & G to file the present action.

After the district court's grant of the injunction, the state filed a motion to stay the judgment in this Court, which was denied by a motions panel. Next, the district court issued an attorney fees award totaling $25,830.28, which is the subject of this appeal. Subsequently, we reconsidered our previous denial of the motion to stay

the judgment, granted a stay pending appeal, and set the case for an early hearing on the merits.

B. *Prevailing Party*

The state argues that G & G is not a prevailing party under 42 U.S.C. § 1988 because while it received the relief it requested – an injunction – the staying of that injunction somehow nullified its legal effect or its mandate that the state alter its unlawful conduct. We reject this argument.

In *Farrar v. Hobby*, the Supreme Court held that to be considered a prevailing party, a plaintiff must "obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement." 506 U.S. 103, 111 (1992) (citations omitted). "In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111-12.

Here, G & G obtained an injunction from the district court, which materially altered the legal relationship between the parties by prohibiting the state from depriving G & G of property without any hearing. Certainly that change benefitted G & G and it is the prevailing party. *See Herrington v. County of Sonoma*, 883 F.2d 739, 744 (9th Cir. 1989) (injunction, which appellate court upheld, rendered plaintiffs prevailing parties despite vacatur of damage award); *see also Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 543 (3d Cir. 1994) (plaintiff who has received injunctive relief has prevailed for purposes of section

1988). That a stay was issued after the district court's grant of the injunction does not alter G & G's status as the prevailing party in the district court, as the district court's judgment is a statement of the rights of the parties unless and until that judgment is altered by a higher court. We have decided not to do so.

C. *General Award of Fees*

The state also claims that the district court erroneously awarded attorney fees based solely on the declaration of Stephen A. Seideman ("Seideman declaration"), G & G's attorney in the district court.[12] More specifically, the state argues that the Seideman declaration fails to discuss many of the factors discussed in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), to be considered by a district court in awarding attorney fees. These include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment due to acceptance of the case; (5) the customary fee; (6) the contingent or fixed nature of the fee; (7) the limitations imposed by the client or the case; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability; (10) the undesirability of the case; (11) the nature of the professional relationship with the client; and (12) awards in similar cases.

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[12] The state does not dispute any specific items, such as the services provided or the hourly rate, or the total amount of fees; it simply asserts that G & G's evidence was not sufficient to support an award of fees.

A district court, however, need not discuss each and every factor separately in making its decision. Rather, a strong presumption exists that the lodestar (reasonable number of hours times reasonable hourly rate) represents a reasonable fee, and "many of these factors usually are subsumed" within the lodestar calculation. *Jordan v. Multnomah County*, 815 F.2d 1258, 1262 (9th Cir. 1987) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). Thus, G & G only had to prove that its hourly rate was reasonable and that the total number of hours expended was reasonable. *See Dennis v. Chang*, 611 F.2d 1302, 1308 (9th Cir. 1980) (award of attorney fees properly granted where based solely on skill and experience of counsel, rates of compensation "typical" of those charged by attorneys for comparable service, and reasonable amount of time spent).

Nevertheless, we agree with the state that G & G did not satisfy its "burden of producing satisfactory evidence, *in addition to the affidavits of its counsel*, that the requested rates are in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation." *Jordan*, 815 F.2d at 1263 (emphasis added). The only evidence in the record about the hourly rate is Mr. Seideman's statement in his declaration that "[t]he hourly rates which I billed Plaintiff are equal to or less than those generally billed by attorneys in Los Angeles for similar services," and a similar statement with regard to the paralegal's hourly rates. These statements constitute an "insufficient basis from which to conclude that the rates requested are 'reasonable.'" *Southerland v. International Longshoremen's and Warehousemen's Union*, 845 F.2d 796, 801 (9th Cir. 1987). Therefore,

while G & G certainly is entitled to fees, we remand to the district court the issue of whether the claimed hourly rates are reasonable. On remand, both G & G and the State should be allowed to supplement the record with additional evidence so that the district court can reevaluate the reasonableness of the fees requested.

In addition, we do not find persuasive the state's related argument that the California Division of Labor Standards Enforcement ("DLSE") and the Department of Industrial Relations were not made parties to the present suit until the First Amended Complaint on September 7, 1995 and hence should not be held accountable for any fees incurred prior to that time. We hold that these parties are jointly and severally liable for the fees, given that the work involved aided in the preparation of the case against all the defendants and the case was not one in which the claims against each defendant varied or one defendant was more culpable than another. *See Woods v. Graphic Communications*, 925 F.2d 1195, 1207 (9th Cir. 1991) (defendant liable for fees previously incurred where fees assisted in preparing case against defendant and served as developmental work for case).

D. *Award of Fees for Work Performed in Previous Lawsuit*

The state asserts that the district court should not have allowed G & G to recoup attorney fees from the *Garza* lawsuit given that it did not prevail in that lawsuit. We uphold the district court's decision.

In *Webb v. Board of Educ.*, 471 U.S. 234, 243 (1985), the Supreme Court affirmed a district court's decision to

deny attorney fees for time spent pursuing optional administrative remedies, specifically school board proceedings. But the Court noted that the petitioner in that case "made no suggestion below that any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement," *id.*, suggesting that if that had happened, maybe the result would have been different. We followed the Supreme Court's lead in *Rock Creek Ltd. Partnership v. State Water Resources Control Bd.*, 972 F.2d 274, 279 (9th Cir. 1992), holding that a sponsor of a hydroelectric project was not entitled to attorney fees under §§ 1983 and 1988 for administrative proceedings before FERC. We reasoned that the FERC proceeding was not a condition precedent to plaintiff's entry to federal court, nor was it a part of a continuing federal court action. Because the FERC proceeding was not related or dependent, it could not form the basis for attorney fees. *Id.*

Cases from other circuits have addressed similar fee issues in non-administrative contexts. For example, the Third Circuit held in *Keenan v. City of Philadelphia*, 983 F.2d 459, 474 (3d Cir. 1992), that the district court did not abuse its discretion in including the time spent in labor arbitration in its fee calculation. It based its decision on the following interpretation of *Webb* by the Third Circuit: "[F]or the time spent pursuing optional administrative proceedings properly to be included in the calculation of a reasonable attorney's fee, the work must be 'useful and of a type ordinarily necessary' to secure the final result obtained from the litigation." *Pennsylvania v. Delaware*

Valley Citizens' Council for Clean Air, 478 U.S. 546, 561 (1986). In addition, the Eighth Circuit briefly addressed a similar situation in *Perkins v. Cross*, 728 F.2d 1099, 1100 (8th Cir. 1984), an action by picketers against municipal officials for violation of their civil rights. The court held that fees could be awarded for any "time the lawyer spent defending the plaintiffs in the original municipal court proceeding to the extent, if any, that research or investigation done in connection with that proceeding proved directly relevant to the successful prosecution of [their] later civil rights claims." *Id.*

Here, G & G made a showing that the work done in the *Garza* lawsuit was directly related to the present action – the allegations in that suit were identical to those made here. Counsel for G & G stated that the legal research and analysis performed in *Garza* were necessary for this action and accordingly saved him from expending more time on this lawsuit. Thus, unlike the *Rock Creek* case, the prior proceeding here was related to the present action. The two can even be viewed as a continuum of proceedings necessary to achieve the relief finally granted, given that the *Garza* case ended in a settlement stating that if the state took further action, G & G could refile the lawsuit, which is what happened. Moreover, caselaw reveals no requirement that a party must have prevailed in a prior proceeding to use that as a basis for attorney fees in another action.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART. Costs to Appellee G & G Fire Sprinklers, Inc.

KOZINSKI, Circuit Judge, dissenting.

In *San Bernardino Physicians' Services Medical Group v. County of San Bernardino*, 825 F.2d 1404 (9th Cir. 1987), we held that "[i]t is neither workable nor within the intent of section 1983 to convert every breach of contract claim against a state into a federal claim." *Id.* at 1408 (footnote omitted). While we recognized that any contract with the state gives rise to what could be characterized as a property interest, we held that this alone is not a basis for invoking the protections of due process. Rather, the interest in question must fall within a narrow category that might fairly be characterized as a civil right, *id.* at 1409, a right in public employment being the quintessential example. *Id.* (*citing Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972)). San Bernardino said that "construction contracts [and] purely material supply contracts" – contracts like the one we have here – do *not* create rights protected by the due process clause. *Id.* at 1410.

The majority abandons *San Bernardino's* nuanced framework in favor of a categorical approach that turns every right to receive payment on a public works contract into a property right protected by due process: "G & G's interest arises from its public works contract; it has a property interest in being paid in full for the construction work it has completed." Maj. op. at 1130. The opinion thus conflicts with *San Bernardino*, as well as the opinions of two other circuits. *See Mid-American Waste Systems, Inc. v. City of Gary*, 49 F.3d 286, 291 (7th Cir. 1995); *Walentas v. Lipper*, 862 F.2d 414, 418 (2d Cir. 1988); *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 966 (2d Cir. 1988).

It is also very bad policy. The state here is engaged in a commercial activity where it holds no special sway over

other parties by virtue of its regulatory powers. In carrying out its project, the state has bargained for the construction to be done according to plan, on schedule, and consistent with health and safety codes; these are ordinary terms just like the ones private parties put into their construction contracts. The state has also bargained for a more exotic term, namely that contractors and subcontractors pay a prevailing wage to their employees. While this differs from what ordinarily appears in private construction contracts, it is not an exercise of the state's regulatory power; rather, it is a term that any private party could equally well put into its contract. If the contractor or subcontractor doesn't like the term, he can refuse to do business with the state.[1]

Here the state determined that G & G did not comply with its prevailing wage obligation, and thus withheld payments. This is no different from a builder's refusal to make progress payments when he discovers (or believes he discovers) a failure of performance on any other term of a standard construction contract, for example, that the plumbing isn't up to code. Withholding payments under such circumstances is the standard remedy. If the subcontractor believes he has met his obligations, he may resort to his remedies under his contract with the general contractor who, in turn, may seek relief from the state or assign his right to do so to the subcontractor. It's a run-of-the-mill contract dispute just like thousands routinely handled by the state courts without federal intervention.

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[1] That the prevailing wage term appears in the California Labor Code doesn't matter. No one is forced to comply unless he agrees to do business with the state.

In lieu of this common sense solution – which also complies with binding precedent – the majority invokes the full panoply of federal due process, including the requirement of a hearing *before* the state may withhold payments for what it believes is defective performance under the contract. While the opinion addresses only the prevailing wage term, its logic carries much farther: If the state discovers any other type of breach – for example, failure to complete the project on time or to comply with applicable safety codes – it must provide an advance hearing before it may withhold payment. This gravely burdens the state's most potent remedy for dealing with recalcitrant contractors and subcontractors.[2] Why the state should be saddled with this yoke when it engages in the purely commercial activity of construction – a burden not suffered by private builders – is beyond me.[3] *San*

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[2] The right to a predeprivation hearing discourages states from cracking down on inefficient, incompetent and corrupt contractors, since such contractors remain on the job (with a right to continuing payment) until the hearing is completed. "Any gains the agency anticipated from terminating inefficient or incompetent contractors or from stopping a project that had lost its value to the state might be consumed by payments during the hearing process and related litigation." Leonard Kreynin, Note, Breach of Contract as a Due Process Violation: Can the Constitution Be a Font of Contract Law?, 90 Colum. L. Rev. 1098, 1099 (1990).

[3] We can't always expect the government to act with unbounded compassion, patience and generosity. Indeed, when the government is acting as a commercial entity, taxpayers cajole it to act with all the ferociousness the marketplace demands. Certain limits must always apply: The government cannot, for example, use public works contracts to discriminate on the basis of race or sex. But when the government bargains

Bernardino clearly teaches that commercial contract rights must be vindicated in state court using state remedies. By ignoring this teaching the majority creates not just an intra-circuit and inter-circuit conflict but also a wholly unwarranted burden on the thousands of states, counties, cities and special use districts governed by our law. Government is too unwieldy already; there is no justification for adding this heavy layer of red tape. I respectfully dissent.

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over the commercial terms of the contract it should enjoy the same ability as private builders to draw up the deal as it likes and seek the best price and the best terms the marketplace allows.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and DOES 1 through 20, Defendants.	) CIVIL NO. 95-4839 R) JUDGMENT) **The Honorable Manuel L. Real**) (Filed Nov. 9, 1995)

This action came on for hearing before the Court, on November 6, 1995, Honorable Manuel L. Real, District Judge Presiding, on a motion for summary judgment, and the evidence presented having been fully considered, the issues having been duly heard and a decision having been duly rendered.

It is ordered and adjudged that Plaintiff is awarded declaratory and injuntive relief against Defendants VICTORIA BRADSHAW; LLOYD W. AUBRY, JR.; DANIEL DELLAROCCA; ROGER MILLER; ROSA FRAZIER; DIVISION OF LABOR STANDARDS ENFORCEMENT; and DEPARTMENT OF INDUSTRIAL RELATIONS ("Defendants") as follows:

DECLARATORY RELIEF

1. California Labor Code §§1727, 1730-1733, 1775, 1776(g) and 1813 violate the due process clause of the Fourteenth Amendment to the United States Constitution and, therefore, are invalid.

2. The practice of Defendants of issuing notices to awarding bodies requiring the withholding of monies from contractors due to alleged violations of California prevailing wage laws is unconstitutional under the due process clause of the Fourteenth Amendment to the United States Constitution, and any such notices issued as to alleged violations by Plaintiff are invalid and of no force and effect.

INJUNCTION

3. Defendants are enjoined from applying or enforcing California Labor Code §§1727, 1730-1733, 1775, 1776(g) and 1813 against Plaintiff or on account of alleged violations by Plaintiff of California prevailing wage laws (i. e., *Cal. Labor Code* §§1720-1861).

Plaintiff shall recover costs of suit.

DATED: Nov -7 1995, 1995

MANUEL L. REAL
THE HONORABLE MANUEL L. REAL
JUDGE OF THE UNITED STATES
DISTRICT COURT, CENTRAL DISTRICT

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

G & G FIRE SPRINKLERS, INC.,	)	No. 95-56639
Plaintiff-Appellee,	)	D.C. No. CV-95-04839-MLR (Central California)
v.	)	
VICTORIA L. BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., Director; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and DOES 1 through 20,	)	ORDER
Defendants-Appellants.	)	(Filed Oct. 28, 1998)

Before: REINHARDT, KOZINSKI and HAWKINS, Circuit Judges.

A majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Kozinski has voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has called for a vote to rehear this matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy	)	CIVIL NO. 95-4839 ER (BQRx) FIRST AMENDED COMPLAINT FOR: 1. DECLARATORY RELIEF (UNCONSTITUTIONAL APPLICATION OF STATE LAWS) 42 U.S.C. § 1983, 28 U.S.C. § 2201 2. DECLARATORY RELIEF (FACIAL UNCONSTITUTIONALITY OF STATE LAWS)

Labor Commissioner of the State of California; ROGER MILLER, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20, Defendants.	)	3. INJUNCTION 42 U.S.C. § 1983 28 U.S.C. § 2202 AND DEMAND FOR TRIAL BY JURY

Plaintiff, G & G FIRE SPRINKLERS, INC., ("Plaintiff") alleges:

FIRST CLAIM FOR RELIEF

(Declaratory Relief)

1. Jurisdiction of this action is conferred on this United States District Court by the provisions of 42 U.S.C.

§ 1983, 28 U.S.C. § 1343(a)(4), and 28 U.S.C. § 2201-2202 inasmuch as this action is to redress a deprivation of civil and constitutional rights guaranteed by the Fourteenth Amendment to the United States Constitution by persons acting under color of state law, to secure a declaration of rights to an actual controversy concerning the unconstitutional application of certain California Labor Code provisions to Plaintiff by Defendants, and Plaintiff's assertions concerning the facial unconstitutionality of those provisions, and to restrain and enjoin Defendants from enforcing the unconstitutional provisions in the future.

2. Venue of this action is proper in this Court under the provisions of 28 U.S.C. § 1391(b) inasmuch as Defendants, or some of them, are either residents of or maintain official offices and places of business within the judicial district of this Court, the United States District Court, Central District of California. Further, Plaintiff conducts business within the county of Los Angeles, California, within this judicial district, and Defendants' conduct alleged herein has affected Plaintiff at its offices and its construction projects located within the judicial district of this Court.

3. Plaintiff is now, and at all times herein mentioned has been, a corporation organized and existing under and by virtue of the laws of the State of California, which does business in, among other places, Los Angeles, California, County of Los Angeles, and with its principal place of business in Culver City, County of Los Angeles, California. Plaintiff is now, and at all times herein mentioned has been, engaged in business as a fire protection contractor duly licensed under the laws of the State of California.

4. (a) Defendant VICTORIA BRADSHAW ("BRADSHAW") is, and at all times herein mentioned has been, Chief of the Division of Labor Standards Enforcement ("DLSE"), (also known as the Labor Commissioner) Department of Industrial Relations, State of California, and, as such, is the public of officer of the State of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws *(California Labor Code* §§ 1720-1815).

(b) Defendant BRADSHAW is sued herein in her official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. § 1983.

5. (a) Defendant LLOYD W. AUBRY, JR. ("AUBRY") is, and at all times herein mentioned has been, Director of the Department of Industrial Relations, State of California, and as such is the public executive officer of the State of California responsible for the overall interpretation and enforcement of the State of California's wage and hour laws, including the "prevailing wage and apprenticeship" laws.

(b) Defendant AUBRY is sued herein in his official capacity, and is a "person" amenable to suit within the meaning of U.S.C. § 1983.

6. (a) Defendant DANIEL DELLAROCCA ("DELLAROCCA") is, and at all times herein mentioned has been, a Deputy Labor Commissioner of the Division of Labor Standards Enforcement (hereinafter "DLSE"), Department of Industrial Relations, State of California, a public officer of the State of California, and, as such, is

one of the public officers of the state of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws.

(b) Defendant DELLAROCCA is sued herein in his official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. § 1983.

7. (a) Defendant ROGER MILLER ("MILLER") is, and at all times herein mentioned has been, a regional manager and/or Senior Deputy Labor Commissioner of the Division of Labor Standards Enforcement ("DLSE"), Department of Industrial Relations, State of California, a public officer of the State of California, and, as such, is one of the public officers of the State of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws.

(b) Defendant MILLER is sued herein in his official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. § 1983.

8. (a) Defendant ROSA FRAZIER ("FRAZIER") is, and at all times herein mentioned has been, a regional manager and/or Senior Deputy Labor Commissioner of the Division of Labor Standards Enforcement ("DLSE"), Department of Industrial Relations, State of California, a public officer of the State of California, and, as such, is one of the public officers of the State of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws.

(b) Defendant FRAZIER is sued herein in her official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. § 1983.

9. Defendants MILLER, FRAZIER, BRADSHAW and AUBRY, and each of them, maintain offices and do business throughout the State of California, and maintain offices and do business in Los Angeles, County of Los Angeles, State of California.

10. Defendant DIVISION OF LABOR STANDARDS ENFORCEMENT ("DLSE"), is, and at all times herein mentioned has been, an agency of the State of California.

11. Defendant DEPARTMENT OF INDUSTRIAL RELATIONS ("DIR") is, and at all times herein mentioned as been, an agency of the State of California.

12. Defendants DLSE and DIR, and each of them, maintain offices and do business throughout the State of California, and maintain offices and do business in Los Angeles, County of Los Angeles, State of California.

13. Plaintiff is ignorant of the true names and capacities of the defendants sued herein as Does 1 through 20, inclusive, and therefore sues the defendants by such fictitious names.

14. Plaintiff has performed work both as a subcontractor and prime contractor on various public works projects which are subject to the prevailing wage requirements set forth in the California Labor Code.

15. Plaintiff intends to continue performing work on public works projects in California as a subcontractor and prime contractor.

16. Defendants, acting under color of California Labor Code §§ 1727-1731, 1774, 1775, 1777.5 and 1815, issued Notices of Wages owed, Notices of Penalty Assessments, and Notices to Withhold (hereinafter referred to

collectively as the "Notices"), to awarding bodies of the prime contracts on public works projects on account of the alleged failure of Plaintiff to pay prevailing wages, including fringe benefits and apprenticeship-training fees, and to have otherwise complied with the prevailing wage and apprenticeship laws. Defendants also issued a Notice of Penalty Assessment purportedly pursuant to Cal. Labor Code § 1776. The Notice of Penalty Assessment was issued without prior notice.

17. Prior to issuing the Notices mentioned in Paragraph 16, above, Defendants did not provide Plaintiff, or the Prime Contractors who employed Plaintiff with any hearing with respect to the allegations or potential forfeitures or penalties, or with respect to the reasons for them, or with respect to the total of the alleged amounts due.

18. The amount presently withheld as a result of such notices is more than $135,000.

19. The awarding bodies continue to withhold not less than $135,000 from the Prime Contractors who employed Plaintiff, on account of the Notices.

20. None of Defendants have provided, or offered to provide, Plaintiff or any of the Prime Contractors either a pre-deprivation or post-deprivation hearing on the claims involved.

21. California Labor Code § 1729 provides:

> "1729. It shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the subcontractor's failure to comply with the terms of this chapter, and if payment has already been made to the subcontractor the contractor may recover from him the amount of the penalty or forfeiture in a suit at law."

The Prime Contractors for the Projects have withheld from Plaintiff not less than $135,000 due to the withholding from said Prime Contractors of monies due to the Notices.

22. Defendants stated to Plaintiff that there is no right to a pre-deprivation hearing. Defendants stated to Plaintiff that Labor Code § 1732 provides that a lawsuit by the contractor or his assignee pursuant to Labor Code § 1731 et seq. is the exclusive remedy of the contractor or his assignee with regard to wages and/or penalties withheld. Plaintiff has been deprived of the sum of not less than $135,000 in earned progress payments due it under its contracts for the Projects.

23. There was no hearing held prior to the issuance of any of the Notices. There is no procedure for a prompt post-withholding hearing with regard to such notices to withhold. There is no requirement that Defendants ever carry any burden to justify the issuance of a notice to withhold. There is no procedure to protect against the issuance of notices to withhold in an excessive amount, resulting in withholding of excessive amounts of money.

24. The issuances of the notices to withhold by DLSE are not necessary to the implementation or enforcement of the prevailing Wage laws. There are no emergency circumstances which necessitate the issuance of notices to withhold without a hearing and/or other reasonable and appropriate procedures.

25. The notices to withhold issued by the DLSE on account of alleged violations by Plaintiff at the above mentioned projects are wrongful, incorrect, and excessive, and were issued arbitrarily and unreasonably.

26. The issuance of the notices to withhold caused Plaintiff to be deprived of property in the form of substantial sums of money as the statutory provisions purported to be enforced by DLSE provide that upon the withholding of money from a prime contract by an awarding body, the contractor may withhold said money from the subcontractor. Thus, the notices to withhold issued by the DLSE were intended to, and did, cause Plaintiff to suffer a deprivation of property.

27. By the acts and conduct set forth above, Defendants have deprived Plaintiff of its property without due process of law in contravention of Section 1 of the Fourteenth Amendment to the U.S. Constitution. Plaintiff is informed and believes and thereupon alleges that Defendants so deprived Plaintiff with knowledge that their actions were in violation of the U.S. Constitution. A reasonable person with knowledge of the facts and information known and available to Defendants would know that the actions as hereinabove alleged were unconstitional.

28. There is now existing between Plaintiff on the one hand, and Defendants, and each of them, on the other hand, an actual, justiciable controversy with respect to which Plaintiff is entitled to have a declaration of its rights and equitable relief, because of the facts, conditions, and circumstances set forth above.

29. (a) Plaintiff is entitled to a declaration of its rights declaring the acts of Defendants, and each of them, have

been and are invalid, illegal, and in deprivation of Plaintiff's due process and property rights guaranteed by the Section 1 of the Fourteenth Amendment to the Constitution of the United Sates, that the Notices are invalid and of no legal effect.

(b) Plaintiff has been required to employ attorneys to vindicate its belief that the provisions of the California Labor Code set forth herein are unconstitutional on their face and as applied, and to prosecute this action, and is entitled to an award of attorney's fees pursuant to the provisions of 42 U.S.C. § 1988.

SECOND CLAIM FOR RELIEF

(Declaratory Relief)

(Facial Unconstitutionality of State Laws)

30. Plaintiff realleges and incorporates by this reference herein each and every allegation contained in paragraphs 1 through 29 of the First Claim for Relief as though fully set forth herein.

31. (a) Insofar as is relevant herein, *California Labor Code* §§ 1727, 1730, 1732, 1733, 1775, and 1776(g), provide:

§ 1727. Withholding of Forfeited Sums

"Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all wages and penalties which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final Payment,

without a full investigation by either the Division of Labor Standards Enforcement or by the awarding body. (1937 ch. 90, 1431, 1992 ch. 1342)"

§ 1730. Transfer of Wages and Penalties to Labor Commissioner

"Every awarding body shall transfer all wages and penalties that have been withheld pursuant to Section 1727 to the Labor Commissioner, for disbursement pursuant to Section 1775, whenever a contractor fails to bring a suit against the awarding body for recovery of wages and penalties that are withheld pursuant to Section 1727 within 90 days after the completion of the contract and formal acceptance of the job. (1992 ch. 1342)"

§ 1733. Recovery of Wages and Penalties – Suit

"Suit may be brought by the contractor or his or her assignee without permission from the state or other authority and is limited to the recovery of the wages and penalties without prejudice to the contractor's or assignees rights in regard to other matters affecting the contract. No other issues shall be presented to the court in the case and the burden shall be on the contractor or his or her assignee to establish his or her right to the wages or penalties withheld. The Division of Labor Standards Enforcement may intervene in any court proceeding brought pursuant to this section. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on motion of the awarding body or the Division of Labor Standards Enforcement.

The Division of Labor Standards Enforcement may, upon written request of any awarding body, assist in the defense of the action. (1937 ch. 90, 1957 Ch. 398, 1988 ch. 160, 1992 ch. 1342)"

§ 1775. Payment Less Than Stipulated Rate – Penalty

"The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her. the amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part."

§ 1776. Payroll records; retention; inspection; noncompliance penalties; rules and regulations

"(g) The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this section. In the event that

> the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due."

(b) On their face, Sections 1727, 1729, 1730, 1732, 1733, 1775 and 1776, deny and deprive persons of their property without due process of law in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, inasmuch as said Sections authorize the deprivation of property without notice or hearing, and provide for the imposition of penalties and forfeitures without notice or hearing.

(c) Defendants presently maintain a policy and practice pursuant to *California Labor Code* §§ 1720-1815 which authorizes the withholding of monies from contractors and Subcontractors who perform services on Public Works Projects, as well as the imposition of penalties and forfeitures, without providing such contractors and Subcontractors any prior notice or prior hearing for alleged violations of said sections.

(d) plaintiff has been required to employ attorneys to vindicate its belief that the provisions of the California Labor Code set forth herein are unconstitutional on their face and as applied, and is entitled to an award of attorney's fees pursuant to the provisions of 42 U.S.C. § 1988.

THIRD CLAIM FOR RELIEF

(Injunction)

32. Plaintiff realleges and incorporates by this reference herein each and every allegation contained in paragraphs 1 through 31 above as though fully set forth herein.

33. The actions and conduct or Defendants have caused plaintiff to suffer great and irreparable injury and unless the Court issues relief by way of a Temporary Restraining order, Preliminary and Permanent Injunction, Plaintiff and other contractors will suffer great and irreparable injury in that Plaintiff and other contractors will (1) be deprived of its property without due process of law; (2) be liable for civil penalties and back wage forfeitures; (3) be required to expend time and money; and (4) be exposed to unfavorable publicity which will injure its reputation as a reputable construction firm resulting in loss of business.

34. Plaintiff does not have an adequate remedy at law because (1) the pecuniary damages which it might suffer are presently difficult or impossible to fully ascertain; and (2) the irreparable injury to plaintiff's reputation cannot be fully compensated by money damages. Further, since the provisions of the California Labor Code set forth herein are unconstitutional on their face, as well as in application to plaintiff, Defendants' conduct in continuing to maintain and enforce such unconstitutional provisions entitles Plaintiff to injunctive relief to enjoin such provisions.

35. Plaintiff has been required to employ attorneys to vindicate its belief that the provisions of the California

Labor Code set forth herein are unconstitutional on their face and as applied, and is entitled to an award of attorney's fees pursuant to the provisions of 42 U.S.C. § 1988.

PRAYER

WHEREFORE, Plaintiff prays for judgment as follows:

1. **ON ITS FIRST CLAIM FOR RELIEF:**

   a. For a Declaration Of Rights in Plaintiff's favor that as applied to Plaintiff, *California Labor Code* §§ 1720-1815 are unconstitutional as a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that the Notices are invalid and of no legal effect;

   b. For Costs of Suit;

   c. For Attorneys' Fees pursuant to Section 42 U.S.C. 1988;

   d. For such other relief as is just and proper.

2. **ON ITS SECOND CLAIM FOR RELIEF:**

   a. For a Declaration Of Rights in Plaintiff's favor that on their face, *California Labor Code* §§ 1727, 1729, 1730, 1732, 1733, 1775 and 1776 are unconstitutional as a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States;

   b. For Costs of Suit;

   c. For Attorneys' Fees pursuant to Section 42 U.S.C. 1988;

   d. For such other relief as is just and proper.

3. **ON ITS THIRD CLAIM FOR RELIEF:**

   a. For a Temporary Restraining Order, Preliminary and Permanent Injunction enjoining Defendants, and each of them, and their agents, employees, attorneys, representatives, as well as all those persons acting in active concert or participation with them, including representatives of the awarding bodies from enforcing, or threatening to enforce, the provisions of *California Labor Code* §§ 1727, 1729, 1775 or 1776 against Plaintiff, or any other person, with regard to any "public works" project, including, without limitation, imposing, or threatening to impose, civil penalties against any person, including Plaintiff; issuing Notices to Withhold with regard to Plaintiff and/or any other person;

   b. For Costs of Suit;

   c. For Attorneys' Fees pursuant to Section 42 U.S.C. 1988;

   d. For such other relief as is just and proper.

DATED: September 6, 1995

LEVIN, STEIN, CHYTEN & SCHNEIDER

By: /s/ Stephen A. Seideman
Stephen A. Seideman, Esq.
Attorneys for Plaintiff
G & G FIRE SPRINKLERS, INC.

DEMAND FOR TRIAL BY JURY

Plaintiff hereby demands trial by jury.

DATED: September 6, 1995

LEVIN, STEIN, CHYTEN & SCHNEIDER

By: /s/ Stephen A. Seideman
Stephen A. Seideman, Esq.
Attorneys for Plaintiff
G & G FIRE SPRINKLERS, INC.

Cal. Labor Code § 172[redacted]

§ 1720. Public Works -- Defined

As used in this chapter, "public works" means:

(a) Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority.

(b) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(c) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(f) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

Cal. Labor Code § 1727

§ 1727. Withholding of Forfeited Sums

Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all wages and penalties which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Standards Enforcement or by the awarding body.

Cal. Labor Code § 1729

§ 1729. Withholding of Penalties from Subcontractor

It shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the subcontractor's failure to comply with the terms of this chapter, and if payment has already been made to the subcontractor the contractor may recover from him the amount of the penalty or forfeiture in a suit at law.

Cal. Labor Code § 1730

§ 1730. Transfer of Wages and Penalties to Labor Commissioner

Every awarding body shall transfer all wages and penalties that have been withheld pursuant to Section 1727 to the Labor Commissioner, for disbursement pursuant to Section 1775, whenever a contractor fails to bring

a suit against the awarding body for recovery of wages and penalties that are withheld pursuant to Section 1727 within 90 days after the completion of the contract and formal acceptance of the job.

Cal. Labor Code § 1731

§ 1731. Suit Against Awarding Body – Wages and Penalties Retained

If suit is brought against the awarding body within the 90-day period and formal notice thereof is given to the awarding body within the 90-day period either by service of summons or by registered mail which is received within the 90-day period, the wages and penalties shall be retained by the awarding body pending the outcome of the suit, and be forwarded to the Labor Commissioner for disbursement pursuant to Section 1775 if the contractor does not prevail in the action. Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund.

Cal. Labor Code § 1732

§ 1732. Recovery of Wages or Penalties – Time for Action

Notwithstanding any other provision of law, the time for action by the contractor or his or her assignee for the recovery of wages or penalties is limited to the 90-day period and suit on the contract for alleged breach thereof in not making the payment is the exclusive remedy of the

contractor or his or her assignees with reference to those wages or penalties.

Cal. Labor Code § 1733

§ 1733. Recovery of Wages and Penalties – Suit

Suit may be brought by the contractor or his or her assignee without permission from the state or other authority and is limited to the recovery of the wages and penalties without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract. No other issues shall be presented to the court in the case and the burden shall be on the contractor or his or her assignee to establish his or her right to the wages or penalties withheld. The Division of Labor Standards Enforcement may intervene in any court proceeding brought pursuant to this section. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on motion of the awarding body or the Division of Labor Standards Enforcement.

The Division of Labor Standards Enforcement may, upon written request of any awarding body, assist in the defense of the action.

Cal. Labor Code § 1771

§ 1771. Prevailing Per Diem Wage Required

Except for public works projects of one thousand dollars ($1,000) or less, not less that the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and

not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

Cal. Labor Code § 1772

§ 1772. Workers Employed Upon Public Work

Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.

Cal. Labor Code § 1773

§ 1773. Adoption of Prevailing Per Diem Wage

The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification or type of workman needed to execute the contract from the Director of the Department of Industrial Relations. The holidays upon which such rates shall be paid need not be specified by the awarding body, but shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workman employed on the project.

In determining such rates, the Director of the Department of Industrial Relations shall ascertain and consider the applicable wage rates established by collective bargaining agreements and such rates as may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where such rates do not constitute the rates actually prevailing in the locality, the director shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification or type of work involved. The rate fixed for each craft, classification or type of work shall be not less than the prevailing rate paid in such craft, classification or type of work.

If the director determines that the rate of prevailing wage for any craft, classification or type of workman is the rate established by a collective bargaining agreement, the director may adopt such rate by reference as provided for in such agreement and such determination shall be effective for the life of such agreement or until the director determines that another rate should be adopted.

Cal. Labor Code § 1773.2

§ 1773.2. Call for Bids – Specification of Wage Rates

The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract.

In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may, in the call for bids, bids specifications, and contract, include a statement that copies of the prevailing rate of per diem wages are on file at its principal office, which shall be made available to any interested party on request. The awarding body shall also cause a copy of the determination of the director of the prevailing rate of per diem wages to be posted at each job site.

Cal. Labor Code § 1774

§ 1774. Specified Prevailing Wage – Must Be Paid

The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.

Cal. Labor Code § 1775, at all relevant times herein. This version of § 1775 was operative prior to January 1, 1998. (An amended version of this statute, reprinted below, became effective on January 1, 1998)

§ 1775. Payment Less Than Stipulated Rate – Penalty

The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her.

The amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertance, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all penalties and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided in this section. This action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in

which the public work or some part thereof was performed, or not later than 90 days after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contractor to establish that the penalties and amounts demanded in the action are not due.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all workers.

Cal. Labor Code § 1775, as currently amended, effective January 1, 1998.

§ 1775. Payment Less Than Stipulated Rate – Penalty

(a) The contractor and any subcontractor under him or her shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or, except as provided in subdivision (b), by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the mistake, inadvertence, or neglect of the contractor or subcontractor in failing to pay the correct rate of prevailing wages, or the previous

record of the contractor in meeting his or her prevailing wage obligations, or the willful failure by the contractor or subcontractor to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor or subcontractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor or subcontractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

(b) If a worker employed by a subcontractor on a public works project is not paid the general prevailing per diem wages by the subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

(1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.

(3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.

(4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

(c) The Division of Labor Standards Enforcement shall notify the contractor on a public works project within 15 days of the receipt by the Division of Labor Standards Enforcement of a complaint of the failure of a subcontractor on that public works project to pay workers the general prevailing rate of per diem wages. If the Division of Labor Standards Enforcement determines that employees of a subcontractor were not paid the general prevailing rate of per diem wages and if the body awarding the contract under which the employees performed work did not retain sufficient money under the contract to pay those employees the balance of wages owed under the general prevailing rate of per diem wages, the contractor shall withhold an amount of moneys due the subcontractor sufficient to pay those employees the general prevailing rate of per diem wages if requested by the Division of Labor Standards Enforcement. The contractor shall pay any money retained from

and owed to a subcontractor upon receipt of notification by the Division of Labor Standards Enforcement that the wage complaint has been resolved. If notice of the resolution of the wage complaint has not been received by the contractor within 180 days of the filing of a valid notice of completion or acceptance of the public works project, whichever occurs later, the contractor shall pay all moneys retained from the subcontractor to the awarding body. The moneys shall be retained by the awarding body pending the final decision of an enforcement action, and be forwarded to the Labor Commissioner for disbursement pursuant to subdivision (d) if the subcontractor does not prevail in the action. Wages for workers who cannot be located after a diligent search by the Labor Commissioner shall be deposited in the Industrial Relations Unpaid Wage Fund pursuant to subdivision (c) of Section 96.7. Penalties shall be paid into the General Fund.

If the subcontractor prevails in the enforcement action, the awarding body shall release any funds retained pursuant to this subdivision to the contractor within 10 working days from the date of the final decision of the court.

(d) To the extent that there is insufficient money due a contractor to cover all penalties and amounts due in accordance with this section or Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the division, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction

to recover the penalties and the amounts due provided in this section. This action shall be commenced not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor and subcontractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contrator and subcontractor to establish that the penalties and amounts demanded in the action are not due. The contractor and subcontractor shall be jointly and severally liable in an enforcement action for any wages due. Following entry of a judgment for joint and several liability, the division shall first exhaust all reasonable remedies to collect the amount due from the subcontractor before pursuing the claim for wages against the contractor. From the amount collected from the subcontractor, the wage claim shall be satisfied prior to the amount being applied to penalties.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all workers.

(e) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

Cal. Labor Code § 1776, in part, at all relevant times herein. This version of § 1776 was operative prior to January 1, 1998. (An amended version of this statute, reprinted below, became effective on January 1, 1998.)

§ 1776. Payroll Records Required

(a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, and straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(b)

* * *

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

* * *

(d) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

* * *

(g) The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this

section. In the event that the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. These stipulations shall fix the responsibility for compliance with this section on the prime contractor.

* * *

* * *

Cal. Labor Code § 1776, in part, as currently amended, effective January 1, 1998.

§ 1776. Payroll Records Required

(a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty or perjury, stating . . .

(1) The information contained in the payroll record is true and correct.

* * *

(b)(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

* * *

(d) A contractor or subcontractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

* * *

(g) The contractor or subcontractor shall have 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section.

* * *

Cal. Labor Code § 1813, at all relevant times herein. This version of § 1813 was operative prior to January 1, 1998. (An amended version of this statute, reprinted below, became effective on January 1, 1998.)

§ 1813. Working Hours Violations – Penalty

The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each workman employed in the execution of the contract by the contractor or by any subcontractor for each calendar day during which such workman is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted therein a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the officer of the state or political subdivision who is authorized to pay the contractor money due him under the contract.

Cal. Labor Code § 1813, as currently amended, effective January 1, 1998.

§ 1813. Working Hours Violations – Penalty

The contractor or subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each worker employed in the execution of the contract by the respective contractor or subcontractor for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted in the contract a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the Division of Labor Standards Enforcement.

This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

Cal. Civil Code §3103

§3103. Stop Notice

"Stop notice" means a written notice, signed and verified by the claimant or his or her agent, stating in general terms all of the following:

(a) The kind of labor, services, equipment, or materials furnished or agreed to be furnished by such claimant.

(b) The name of the person to or for whom the same was done or furnished.

(c) The amount in value, as near as may be, of that already done or furnished and of the whole agreed to be done or furnished.

(d) The name and address of the claimant.

* * *

The notice, in the case of any public work for the state, shall be filed with the director of the department which let the contract and, in the case of any other public work, shall be filed in the office of the controller, auditor, or other public disbursing officer whose duty it is to make payments under the provisions of the contract, or with the commissioners, managers, trustees, officers, board of supervisors, board of trustees, common council, or other body by whom the contract was awarded. No stop notice shall be invalid by reason of any defect in form if it is sufficient to substantially inform the owner of the information requested.

Any stop notice may be served by registered or certified mail with the same effect as by personal service.

Cal. Civil Code §3181

§3181. Persons Entitled to Serve Stop Notices

Except for an original contractor, any person mentioned in Section 3110, 3111, or 3112, or in Section 4107.7 of the Public Contract Code, or furnishing provisions, provender, or other supplies, may serve a stop notice upon the public entity responsible for the public work in accordance with this chapter.

Cal. Civil Code §3184

§3184. Time Limit for Effective Service of Stop Notice

To be effective, any stop notice pursuant to this chapter must be served before the expiration of:

(a) Thirty days after the recording of a notice of completion (sometimes referred to in public works as a notice of acceptance) or notice of cessation, if such notice is recorded.

(b) If no notice of completion or notice of cessation is recorded, 90 days after completion or cessation.

Cal. Civil Code §3186

§3186. Duty to Withhold – Amount Sufficient to Answer Claim and Litigation Costs

It shall be the duty of the public entity, upon receipt of a stop notice pursuant to this chapter, to withhold from the original contractor, or from any person acting under his or her authority, money or bonds (where bonds are to be issued in payment for the work of improvement) due

or to become due to that contractor in an amount sufficient to answer the claim stated in the stop notice and to provide for the public entity's reasonable cost of any litigation thereunder. The public entity may satisfy this duty by refusing to release money held in escrow pursuant to Section 10263 or 22300 of the Public Contract Code.

Cal. Civil Code §3210

§3210. Action to Enforce Stop Notice – Time of Commencement Thereof – Work of Improvement Subject to Acceptance by a Local Public Entity

An action against the original contractor and the public entity to enforce payment of the claim stated in the stop notice may be commenced at any time after 10 days from the date of the service of the stop notice upon the public entity and shall be commenced not later than 90 days following the expiration of the period within which stop notices must be filed as provided in Section 3184. * * *

Supreme Court, U.S.
FILED
AUG 28 2000
CLERK

No. 00-152

In The

Supreme Court of the United States

VICTORIA L. BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California,

Petitioners,

v.

G & G FIRE SPRINKLERS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Petition sets forth four questions, allegedly presented by this case (Pet. p. i). None of the four questions asserted by Petitioners are presented by this case.

The questions presented by this case are as follows:

"When state law enforcement officials assess civil penalties, and forfeitures, for alleged violations of state law; and order seizure of money on account thereof, must they comply with the due process clause of the fourteenth amendment."

"Is notice and a pre-deprivation, or prompt post-deprivation; hearing required, when state law enforcement officials assess civil penalties, and forfeitures, for alleged violations of state law; and order seizure of money on account thereof."

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I. SUMMARY OF THE ARGUMENT

The questions presented in the Petition are not raised by this case. The issue presented in this case was whether due process is required when law enforcement officials assess civil penalties and forfeitures for alleged violations of state law, and seize money on account thereof. The California Supreme Court has held that the actions of the state officials is regulatory, and not proprietary conduct; and does not constitute a contractual dispute. The holding of the California Supreme Court, as to California law, is binding on all other courts.

The procedure which was challenged is similar to a writ of attachment or garnishment. State law enforcement officials ("DLSE") order property owners ("awarding bodies") to hold money, for transmittal to DLSE, on account of civil penalties and forfeitures assessed by DLSE for alleged violations of the state labor code. The orders are issued without notice, hearing, or explanation. The DLSE is not in privity of contract with the awarding body. The order must be complied with, under threat of criminal prosecution. The only remedy is to file a lawsuit for return of money seized, and the money must be held until final judgment, and exhaustion of all appellate rights, which can take years. The Court of Appeals held that a prompt post-deprivation hearing is required to determine whether there is adequate grounds for the seizure.

The decision of the Court of Appeals does not conflict with any other decision. The DLSE position conflicts with longstanding due process precedents. There are a

myriad of state laws regulating the performance of contracts, both public and private. If adopted, the DLSE position would hold that state enforcement officials could assess civil penalties for alleged violations of state law, and seize money due on account thereof, without due process; so long as state law obligates businesses to comply with the law when performing a contract. The DLSE position advocates an unprecedented contraction of due process rights, and expansion of government power.

The Court of Appeals decision expressly states that mere contractual disputes do not give rise to a due process claim. There is nothing in the decision which suggests, or holds, that public entities, who are parties to a contract, must provide a due process hearing when acting in accordance with their proprietary interests as a marketplace participant. DLSE's contention that special status, such as tenure for a teacher, is required, is incorrect. Even a temporary, non-tenured teacher has due process rights, if money owed, is seized for civil penalties assessed for alleged violations of state law.

II. INTRODUCTION

G&G FIRE SPRINKLERS, INC. ("G&G") filed this action seeking declaratory and injunctive relief. G&G sought a declaration that the notice to withhold procedure utilized by the California Division of Labor Standards Enforcement ("DLSE") in connection with enforcing prevailing wage laws violates the Fourteenth Amendment of the United States Constitution. The defendants in the action were DLSE, and certain officials thereof. DLSE is ~~an~~ agency of the State of California.

DLSE is mandated by California law as the agency responsible for enforcement of the California Labor Code. *Cal. Labor Code* § 90.5. DLSE is mandated to enforce the so-called prevailing wage law statutes. *Cal. Labor Code* § 90.5(b). DLSE is authorized by statute to impose civil penalties for violations of various statutory provisions; and forfeitures of alleged wage underpayments; and to seize money on account thereof, without any notice or hearing. *Cal. Labor Code* §§ 1727, 1775, 1776(g), 1813. *Kruegar v. San Francisco* 198 Cal.App.3d 1; 243 Cal.Rptr. 585 (1988). No person, including the person alleged to have violated the Labor Code, is entitled to notice or hearing before the assessment of civil penalties or forfeitures, and seizure of money on account thereof. Furthermore, there is no procedure for a prompt post-deprivation hearing. The District Court, and Court of Appeals, held that such action violates the due process clause.

The notice to withhold is an order to the "awarding body" (i.e., the public entity that awarded a public works contract or private owner receiving public funds) requiring the withholding of money due under a public works contract, for transmittal to DLSE. *See*, Exc. 23, Exhibit 2A, 2B, 2C.[1] The awarding body may be a city or other public entity created by California law, or a private owner of a project funded, in whole or in part, by public monies. *Cal. Labor Code* § 1720. Under California law, there is no privity of contract between the DLSE and the awarding body. *Lusardi v. Aubry* 1 Cal.4th 976, 995; 4 Cal.Rptr.2d 837

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[1] The reference "Exc." is to the excerpts on appeal which were filed in the Court of Appeals.

(1992). The awarding body is obligated to comply with the DLSE order, under threat of criminal prosecution. *Cal. Labor Code* § 1777. The contractor may file a lawsuit within ninety days of completion of the project for recovery of the monies withheld. *Cal. Labor Code* § 1731. The lawsuit is the exclusive remedy for recovery of monies withheld, no issue other than the validity of the civil penalties and assessment of wages due may be presented in the action; and the contractor has the burden to prove the invalidity of DLSE's assessment of civil penalties and wages due. *Cal. Labor Code* §§ 1731-1733. If a lawsuit is not filed within the ninety-day period, the monies are transmitted to DLSE. Exc. 23, Exhibits 2A, 2B, 2C. If a lawsuit is filed, the money must be withheld until final judgment is entered, including exhaustion of all appellate rights. *Krueger v. San Francisco* 198 Cal.App.3d 1, 243 Cal.Rptr. 585 (1988); *Cal. Labor Code* §§ 1731-1733. Even if the notice to withhold is without merit, it can take years for the contractor to recover the money seized on account of civil penalties and forfeitures. The contractor is required to continue to perform work, even though the money which would fund performance has been seized by DLSE. A failure to continue performance constitutes a breach of contract, subjecting the contractor to a claim by the awarding body for damages. The civil penalties alone, which are assessed without notice or explanation, can be hundreds of thousands of dollars. The procedure allows DLSE enforcement officials to inflict severe injury, with no constitutional constraint. The evidence established that contractors are often forced out of business by a notice to withhold.

The United States Supreme Court has repeatedly held that a temporary deprivation pending the outcome of an underlying lawsuit requires due process. *United States v. James Daniel Good Real Property* 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993); *Sniadach v. Family Finance Corp.* 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); *Fuentes v. Shevin* 407 U.S. 67, 85, 92 S.Ct. 1983, 32 L.Ed. 556, 572 (1972).

DLSE asserts, without any basis, that the case does not involve state action and/or solely involves issues of breach of contract.

DLSE points out that the Supreme Court granted DLSE's previous petition for writ of certiorari, and remanded the case for further consideration in light of *American Manufacturers Mutual Insurance v. Sullivan* 526 U.S. 40, 119 S.Ct. 977 (1999). DLSE fails to point out that it filed a petition for writ of certiorari which stated that the issue addressed by the Court of Appeals in this case is as follows:

> "Is a commercial contractor who claims that a public agency breached a contract by failing to make payment entitled by the due process clause of the fourteenth amendment to anything more than an opportunity to pursue its contract claims through an ordinary state court lawsuit?"

No such issue is raised by this case. The contention that this is a breach of contract action has been completely rebutted. There is no reason to grant certiorari.

III. THE QUESTIONS PRESENTED, AS STATED IN THE PETITION, ARE NOT ISSUES PRESENTED BY THIS CASE.

A. The Court Did Not Consider Whether Every Nonpayment to a Contractor Is a Deprivation of Due Process

The Court of Appeals expressly held that this case did not involve breach of contract. The Court stated:

> "[W]e must bear in mind that the Fourteenth Amendment was not intended to shift the whole of the public law of the states into the federal courts. . . . Even though every contract may confer some legal rights under state law, that fact alone need not place all contracts within federal due process protection . . . Drawing on these principles, the state asserts that because the withholding procedure at issue is contained in G & G's contract, this case is nothing more than a contractual dispute that does not rise to the level of a constitutional claim. Moreover, the state argues that construing this case to present a constitutional claim would result in the 'federalization' of state contract law by giving G & G and all others who contract with the state an opportunity to have their grievances reviewed in federal court when they should be confined to their contractually bargained-for remedies under state law. This argument, however, misses the mark. *Unlike the cases cited by the state, this case does not involve a breach of contract claim or a challenge to the contract itself.*" (Emphasis added).

G & G Fire Sprinklers v. Bradshaw 156 F.3d 893, 901-902 (9th Cir. 1998).

1. This Is Not A Breach Of Contract Action

DLSE contends that this case involves nothing more than a contractual dispute between parties to a contract. The contention that this case involves a mere breach of contract dispute is completely rebutted for the following reasons:

a. DLSE enforces the regulatory power of the state, not the proprietary interests of the awarding body. *See Lusardi supra* at 995; see also Section VI *infra*.

b. The California Supreme Court has held, as a matter of state law, that DLSE's activities in enforcing the prevailing wage laws are not contractual. *Lusardi v. Aubry* 1 Cal.4th 976, 4 Cal.Rptr.2d 837 (1992). The California Supreme Court expressly held that DLSE enforcement actions are, in no way, dependent upon a contract. The California Supreme Court held that the DLSE enforcement actions are undertaken to enforce statutory obligations imposed by the California Labor Code. *Id. See also Cal. Labor Code* § 90.5(b). The California Supreme Court analogized the actions of DLSE to that of a criminal prosecutor. *Lusardi* at 992. The California Supreme Court holding on this issue of state law is binding on all other courts.

c. DLSE is not a party to any contract. The California Supreme Court expressly held in *Lusardi* that there is no privity of contract between DLSE and the awarding body. *Lusardi* at 995. Once again, since this is an issue of state law that has been decided by the California Supreme Court, it may not be reconsidered by any other court.

d. DLSE assesses civil penalties for violations of state law. Under California law, penalty provisions in a contract are void. The assessment of civil penalties can never be a matter of contract.

e. The California Supreme Court has held that the prevailing wage laws are intended to protect and benefit employees, and not to benefit the public entity which awarded the contract. *Lusardi supra* at 985, 987 and 995. DLSE's actions are to enforce the state law, which implements public policy, and not pursuant to any contractual dispute between parties to a contract. *See Cal. Labor Code* § 90.5.

f. The notice to withhold effectuates a seizure of money due under the contract, similar to a writ of attachment or garnishment. The notice to withhold procedure only causes seizure of "money due" under the contract. *Cal. Labor Code* §§ 1727 and 1776(g). Section 1776(g) expressly states that "penalties shall be withheld from progress payments *then due*." Section 1727 says payments are to be withheld from "money due." The California Supreme Court expressly stated that the forfeitures and penalties are withheld "from sums due under the contract." *Lusardi supra* at 986. The notices to withhold issued by DLSE state "you are directed to withhold and retain *from any payments due the general contractor* the total amount of ___ which is the sum of all wages and penalties forfeited pursuant to the provisions of Labor Code § 1727 . . . " Exc. 23, Exhibit 2B.

g. Officials of the awarding body are obligated to comply with the notice to withhold, under threat of criminal prosecution. *Cal. Labor Code* § 1777.

h. Usual breach of contract remedies do not apply. *See G & G Fire Sprinklers supra* 156 F.3d at 902, fn. 6.

i. The civil penalties, and forfeitures for alleged wage underpayments, are not contract damages. The awarding body is not liable for penalties, or wages.

j. DLSE did not dispute the following statement of uncontroverted facts and conclusions of law in the District Court:

> "13. DLSE undertakes the function of enforcement of the California Labor Code provisions relating to payment of prevailing wages.
>
> 14. The aforesaid prevailing wage requirement applies to all construction projects for which the entity awarding the prime contract is a public entity (hereinafter referred to as the "Awarding Body").
>
> 15. Defendants have adopted, and utilized, the practice and procedure of issuing notices to withhold money to Awarding Bodies on account of wages and penalties due for alleged violations of California laws relating to payment of prevailing wages.
>
> 16. The notices to withhold issued by Defendants require Awarding Bodies to withhold monies otherwise due to contractors in the amount set forth in the notice.
>
> 17. The result of the issuance of a notice to withhold by Defendants is the withholding of money otherwise due and payable to contractors who have been the subject of such notice to withhold."

Excerpt from record No. 9, docket sheet ___.

The contention that this case involves a mere contractual dispute between parties to a contract is completely without merit.

B. The Court Did Not Consider Whether Action Within the Absolute Discretion of a Private Party Constitutes State Action

1. The Conduct Challenged in this Action Is Clearly State Action

DLSE asserts that the conduct challenged in this action is that of a private contractor. The assertion by DLSE is completely incorrect. G&G's challenge was to the conduct of the DLSE officials in issuing notices to withhold. The pleadings, the proceedings in the District Court, and the opinion of the Court of Appeal all address that issue. It is axiomatic that actions of state law enforcement officials, pursuant to their mandate to enforce state law, constitute state action.

DLSE contends that G&G has standing to challenge the notice to withhold procedure only as a subcontractor. The pleadings and evidence in the District Court established that G&G had standing to challenge the notice to withhold procedure as both a prime contractor and a subcontractor. G&G had been subject to notices to withhold as both a prime contractor and a subcontractor. Exc. 9, ¶¶14, 15; Exc. 23, ¶¶5, 8. Hence, G&G clearly had standing to seek declaratory and injunctive relief with regard to the notice to withhold procedure, as both a prime contractor and subcontractor. *Associated General Contractors v. Coalition for Economic Equity* 950 F.2d 1401 (9th Cir. 1991); *Flast v. Cohen* 392 U.S. 83 (1968); *Warth v.*

Selvin 422 U.S. 490 (1975); *Lujan v. Defenders of Wildlife* 504 U.S. 555 (1992).

Moreover, a subcontractor has standing to challenge the constitutionality of the DLSE action since the subcontractor is the target of the enforcement action, the penalties or forfeitures are based on alleged violations of the Labor Code by the subcontractor, and state law provides that the subcontractor bears the economic burden of the notice to withhold. *Id. See also G & G Fire Sprinklers v. Bradshaw* 156 F.3d 893, 899-901 (9th Cir. 1998).

a. This Action Is Distinguishable From *American Manufacturers Mutual Insurance v. Sullivan* 526 U.S. 40, 119 S.Ct. 977 (1999) With Regard To The Issue Of State Action For The Following Reasons

1. In *Sullivan*, the defendants were private insurance companies. In *Sullivan*, the Supreme Court characterized the argument by stating, "The argument goes, we need not concern ourselves with the identity of the defendant." In this case, the defendants are public agencies and officials of the State of California.

2. In *Sullivan*, the court stated that "The party charged with the deprivation must be a person who may fairly be said to be a state actor." The court held that private insurance companies were not state actors. In this case, it is the defendant DLSE who assesses civil penalties and forfeitures, and orders seizure of money on account thereof. This action deals with a state actor.

3. As explained above, G&G has standing as a prime contractor, and as a subcontractor, to seek declaratory and injunctive relief with regard to the notice to withhold procedure. Moreover, even as a subcontractor, G&G has standing to challenge the notice to withhold procedure. The action challenged is that of the DLSE. Even assuming, arguendo, that the issue was whether state action was involved in the pass-through of the withholding to the subcontractor; under *Sullivan*, there is state action. *Sullivan* states that there is state action, even as to conduct by private parties, where "The state has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state." Clearly, the state exercises coercive power, when DLSE assesses civil penalties and forfeitures based on alleged violations of the Labor Code by a subcontractor, and then seizes money due to the prime contractor, while authorizing the prime contractor to withhold such money from the subcontractor. If the prime contractor does not withhold payment from the subcontractor, the prime contractor suffers the loss. The conduct of DLSE also provides such significant encouragement that the action must be deemed that of the state. The contention that the prime contractor may, if he chooses, pay money to the subcontractor, is immaterial. For example, in *Sniadach supra*, the employer who received the garnishment order was free to pay wages to the employee. However, doing so would not relieve the employer of liability under the garnishment order. In this case, payment by a prime contractor to the subcontractor does not relieve the prime contractor of liability under the notice to withhold.

4. In *Sullivan*, the Supreme Court expressly relied on the fact that it is solely a private party which makes the determination whether to dispute the claim for benefits under the policy. The Supreme Court stated that the decision "is made by concededly private parties, and turns on judgments made by private parties without standards established by the state." In this action, the determination to assess civil penalties and forfeitures for alleged violations of the Labor Code, and to issue an order to withhold, is made by DLSE. In this case, it is the government which initiates the action resulting in the seizure of money. In *Sullivan*, there was merely a dispute by a private party with a private insurance company.

5. In *Sullivan*, the Supreme Court described the procedure as one of "state inaction, or more accurately, a legislative decision not to intervene in a dispute between an insurer and an employee over whether a particular treatment is reasonable and necessary." This case does not involve "state inaction." This case involves state law enforcement officials undertaking enforcement action for alleged violations of state law.

6. In *Sullivan*, the private insurance company could seek a determination from a state administrative tribunal (called the "URO") with regard to whether treatment was reasonable and necessary. The Supreme Court stated that, while the decision to submit a case to the URO is not state action, any decision by the URO is state action. In this case, it is DLSE that makes the decision that the State Labor Code was violated, and assesses civil penalties and forfeitures, and an order to withhold.

7. *Sullivan* did not involve a seizure of money by a third party. *Sullivan* was a dispute between the worker and the insurer. No third party issued an order to the insurer, to withhold money due under the policy, on account of civil penalties and forfeitures which had been assessed by a state enforcement agency. The Supreme Court expressly distinguished such a case in *Sullivan*. The Supreme Court stated, "In the present case, of course, there is no effort by petitioners to seize property of respondents by an ex parte application to a state official." In this case, DLSE makes ex parte assessments of penalties and forfeitures, and issues orders to withhold money due on account thereof.

C. The Court of Appeals Did Not Consider Whether a Third Party Not Targeted by Statute Suffers a Denial of Due Process Where the Impact Is at Most Indirect

G&G had standing to seek declaratory and injunctive relief with regard to the notice to withhold procedure, as both a prime contractor and subcontractor. *Associated General Contractors v. Coalition for Economic Equity* 950 F.2d 1401 (9th Cir. 1991); *Flast v. Cohen* 392 U.S. 83 (1968); *Warth v. Selvin* 422 U.S. 490 (1975); *Lujan v. Defenders of Wildlife* 504 U.S. 555 (1992). DLSE's contention that G&G's injuries consist solely of non-actionable indirect averse effects of governmental action is without merit, even where G&G acts as a subcontractor.

DLSE has issued notices to withhold asserting violations by G&G as a subcontractor. (*See*, Exc. 23; Ex. 2).

Labor Code 1729 provides for withholding from a subcontractor in such circumstances. Thus G&G, as subcontractor, is not only the accused party, but also bears the financial burden of the withholding. An accused subcontractor has no remedy against the prime contractor, as the Labor Code allows for withholding payment from the subcontractor so long as the notice to withhold by DLSE remains in effect. *Cal. Labor Code* § 1729.

DLSE asserts that under *O'Bannon v. Town Court Nursing Center* 447 U.S. 773, 100 S.Ct. 2467 (1980), G&G cannot assert a claim. DLSE's contention is without merit. *O'Bannon* does not bar G&G's claim. To the contrary, *O'Bannon* expressly makes clear that G&G may assert a claim. *O'Bannon* concerned a nursing home which had been certified to provide care for patients receiving Medicare/Medicaid. The government revoked the certification pursuant to proceedings instituted against the nursing home (Town Court). There was no dispute that due process was provided to Town Court. Certain patients of the nursing home contended that they had a separate right to a due process hearing before the certification could be revoked. *In this case,* unlike *O'Bannon, no one was given due process;* since the prime contractor is not provided due process. Moreover, *the Supreme Court expressly distinguished a situation where governmental action against a person is intended or expected to affect a third person who is considered the responsible party. Id.* at 789, fn. 22.

A notice to withhold, due to alleged violations by a subcontractor, is precisely the type of situation distinguished by the court in *O'Bannon*. The statutory scheme provides that upon the assertion of forfeitures and/or

penalties on account of a subcontractor, the subcontractor's money is withheld (*Cal. Labor Code* § 1729). The deprivation of such money is not a mere incidental effect of the governmental action. To the contrary, it is the expected and intended effect. The subcontractor is the alleged violator of the law, who is targeted by the notice to withhold.

In *O'Bannon*, the court explained that the nursing home had a due process right to contest the decertification, and was the party with the greatest interest in doing so. *Id.* at 789 fn. 22; 797. Under California Labor Code, *neither* the prime contractor or subcontractor is entitled to due process. Moreover, if a subcontractor's money is withheld, the prime contractor has no financial incentive to contest the action.

In *Flast v. Cohen* 392 U.S. 83 (1968) the court held that plaintiff's status as a taxpayer was sufficient to confer standing to attack a statute providing for the payment of government money to a religious school.

In *Warth v. Selvin* 422 U.S. 490 (1975), the court held plaintiff had standing to attack the constitutionality of exclusionary zoning. The court explained to have standing a party need merely only show some injury due to the governmental action. The court stated so long as the plaintiff suffered some injury, the plaintiff may invoke the rights of others. *Warth supra* at 501. The court further explained that a third party has standing where its injury resulted indirectly in the deprivation of the rights of another. *Id.* at 504-505.

G&G was the target of the unconstitutional action. G&G suffered substantial injury due to the unconstitutional procedure. Clearly, G&G has standing to assert the unconstitutionality of the procedure.

Under the theory of DLSE, no one has standing to challenge the unconstitutional conduct. DLSE says a subcontractor has no standing, because the order seizes money due the prime contractor; and a prime contractor has no standing because he suffers no injury, since the law allows the loss to be passed through to the subcontractor. In fact, G&G has standing as both a prime contractor and subcontractor.

D. The Case Does Not Raise the Question of Whether a Contractor Who Has Not Alleged an Entitlement to Public Funds Can State a Claim for Denial of Due Process Based on the State's Withholding Said Funds

As a matter of law, a notice to withhold only has effect when money is due under the contract. The notice is similar to a writ of attachment. If a writ of attachment is served on a person who is not indebted to the defendant, the writ has no effect. If a notice to withhold is served on an awarding body that does not owe money to the contractor, the notice has no effect. If no money is owed under the contract, there is no money to transmit to DLSE as payment of the civil penalties. California law expressly provides that the notice to withhold seizes money due. The California Supreme Court explained the statutory provision as follows: "Deficiencies and penalties are to be withheld by the awarding body *from sums*

due under the contract. (§ 1727.)" *Lusardi v. Aubry* 1 Cal.4th 976, 986; 4 Cal.Rptr.2d 837, 842 (1992).

Where an existing entitlement under state law (such as money due under a contract) is eliminated, for cause, by state action (such as assessment of civil penalties for violation of state law, and an order to withhold money due to secure payment thereof), there is a deprivation of property. *Logan v. Zimmerman Brush Co.* 455 U.S. 422, 101 S.Ct. 1148, 71 L.Ed.2d 265 (1982). *American Manufacturers Mutual Insurance v. Sullivan* 526 U.S. 40, 119 S.Ct. 977 (1999) does not change this long established principle. DLSE's reliance on *Sullivan* is misplaced. In *Sullivan*, it had not been established that payment was due. In this action, the notice to withhold only has effect when money is due under the contract. The notice to withhold secures payment of civil penalties and wages allegedly due to third parties. The penalties and wages are transferred to DLSE from the money due the contractor under the contract. The notice to withhold is issued pursuant to the Labor Code, as a law enforcement action, and does not involve a contractual dispute between the parties to the contract. DLSE's contention that special status, such as tenure for a teacher, is required, is incorrect. *Cf. Board of Regents v. Roth* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Even a temporary, non-tenured teacher has due process rights, if money owed, is seized for civil penalties assessed for alleged violations of state law. *Sniadach, supra; Fuentes, supra.*

This case was decided in the District Court on summary judgment. The following facts were not disputed by DLSE:

"16. The notices to withhold issued by Defendants require awarding bodies to withhold monies otherwise due to contractors in the amount set forth in the notice.

26. The DLSE has issued notices to withhold to the Awarding Bodies of various public works projects on account of alleged violation of the prevailing wage law by Plaintiff. The projects for which such notices to withhold have been issued include those known as Moore Hall Seismic Renovation at the University of California, Los Angeles; University Center at the University of California, Santa Barbara; Recreation Center at the University of California, Santa Barbara; The Pyramid at California State University, Long Beach; Anaheim City Utilities Building; CSU, San Bernardino; San Joaquin General Hospital; Culver City, City Hall.

29. As a result of those notices to withhold still pending, which were issued by DLSE as to Plaintiff, there is at least $120,000 which has been withheld from monies otherwise due Plaintiff."

Ex. of Record No. 9, Docket Sheet ___, Plaintiff's Statement of Uncontroverted Facts and Conclusions of Law. *See also,* Ex. of Record No. 12, Docket 25, Defendants' Statement of Genuine Issues of Material Fact.

California law, and the undisputed facts of this case, establish that DLSE seizes money established to be due under the contract.

IV. AMERICAN MANUFACTURES MUTUAL INSURANCE V. SULLIVAN IS DISTINGUISHABLE, AND NOT APPLICABLE TO THIS CASE.

DLSE argues that *American Manufactures Mutual Insurance v. Sullivan* 526 U.S. 40, 119 S.Ct. 977 (1999) requires reversal of the Court of Appeals decision. DLSE is incorrect. *Sullivan* is distinguishable from this action in the following respects:

1. *Sullivan* involved a public insurer acting in a proprietary manner, as would any private insurer. This action involves a state enforcement agency exercising its regulatory power as government, enforcing the State Labor Code.

2. *Sullivan* involved disputes between the parties to the contract; whereas, this action involves enforcement activity by DLSE who is not a party to the contract.

3. *Sullivan* involved disputes as to whether money was due under the contract. This action involves the assessment of punitive civil penalties for violations of state law.

4. *Sullivan* did not involve seizure of money due, on account of third party claimants. This action involves the DLSE ordering seizure of money on account of third party claims (civil penalties allegedly owed the state, and possibly wage claims).

5. In *Sullivan* payment was not due; in this action payment is due under the contract.

Sullivan would be similar to this case if, after the worker in *Sullivan* had established the right to payment of a medical bill, a law enforcement agent ordered the

insurer to hold payment, for transmittal to the enforcement agency, as a civil penalty assessed for an alleged violation of state law. Under such circumstances, due process would require a pre-deprivation hearing, or prompt post-deprivation hearing.

V. THE COURT OF APPEAL DECISION DOES NOT CONFLICT WITH ANY OTHER DECISIONS

DLSE contends that the Ninth Circuit's decision in this case conflicts with other court of appeal decisions. DLSE has relied on cases holding that not all contractual disputes with public entities give rise to a due process claim. *See San Bernardino Physicians' Services Medical Group, Inc. v. County of San Bernardino* 825 F.2d 1404 (9th Cir. 1987); *S & D Maintenance v. Goldin* 844 F.2d 962 (2nd Cir. 1988); *Martz v. Village of Valley Stream* 22 F.3d 26 (2nd Cir. 1994); *Christ Gatzonis Electrical Contractor, Inc. v. New York School Construction Authority* 23 F.3d 636 (2nd Cir. 1994); *Brown v. Brienen* 722 F.2d 360 (7th Cir. 1983); *Bleeker v. Dukakis* 665 F.2d 401 (1st Cir. 1981). The Court of Appeal's decision in this case does not conflict with the cases cited with DLSE.

The Court of Appeal expressly distinguished this case, from the case cited by DLSE. The Court of Appeal explained that "unlike the cases cited by the State, this case does not involve a breach of contract claim or a challenge to the contract itself". *G & G Fire Sprinklers v. Bradshaw* 156 F.3d 893, 902 (9th Cir. 1998).

The cases relied on by DLSE involved contractual disputes between parties to a contract. The cases involved disputes, such as, whether payment was due under the

terms of the contract, or whether the contract was procured by fraud. In each such case, the defendant was a contracting agency acting in a proprietary manner. None of the cases involved the imposition of civil penalties, for alleged violations of state law, and the issuance of an order to the contracting agency seizing money on account thereof.

VI. THIS CASE DOES NOT INVOLVE MARKETPLACE ACTIVITY BY THE STATE

The petition suggests that this case involves marketplace activity by the State. This case concerns regulatory activity of the State, not marketplace activity. The Supreme Court has recognized that a governmental entity may act as regulator, or as a proprietor. Essentially, the difference is whether the government is acting as government, or merely participating in the marketplace as would any private owner of property. *See, Building and Construction Trades Council of the Metropolitan District v. Associates Builders and Contractors of Massachusetts* 507 U.S. 218 (1993); *Wisconsin Department of Industry v. Gould* 475 U.S. 282 (1986). In *Building and Construction Trades* the court explained that government acts as a marketplace participant, when it manages its own property, according to its purely proprietary interests, with no interest in setting policy, where analogous private conduct would be permitted. *Id.* at 229, 231-232. "States have a qualitatively different role to play from private parties. When the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role . . . Moreover, as a regulator of private conduct, the

State is more powerful than private parties. These distinctions are far less significant when the State acts as a market participant with no interest in setting policy." *Id.* at 229.

In *Gould,* the State of Wisconsin barred three-time violators of the NLRA from bidding on State construction projects. The Supreme Court held that such debarment was regulatory, not proprietary, and therefore preempted by the NLRA. The court explained that the debarment rule was an effort to promote public policy, and not merely to pursue the proprietary interest of the State.

The conduct of DLSE is wholly regulatory, and not proprietary. DLSE is not pursuing a proprietary interest. DLSE is not the owner of the property, or even a party to the public works contract. The awarding body does pursue certain proprietary interests in connection with its contracting for the public works project. There is no privity of contract between the awarding body and the DLSE. *Lusardi supra* at 995. The California Supreme Court has explained that there is a "direct and palpable conflict" between DLSE and the awarding body. *Id.* at 995. The awarding body has "an interest in obtaining the lowest possible cost for construction," whereas the DLSE has an interest "in enforcing the prevailing wage laws. Contractors that do not pay the prevailing wage . . . may be preferred by local government agencies for public works projects, because the construction dollar will purchase more when a contractor who is paying less than the prevailing wage is selected." *Id.* at 995. The California Supreme Court in *Lusardi,* and the DLSE in its petition, both assert that the purpose of prevailing wage laws is to protect and promote the interests of workers. The DLSE

operates pursuant to its statutory mandate to enforce the Labor Code. *Cal. Labor Code* § 90.5. DLSE imposes civil penalties for violation of the law. The actions of DLSE are to promote the public policy, embodied in the statutes being enforced. The actions of the DLSE are regulatory, and not merely proprietary.

VII. THE PETITION INCLUDES A NUMBER OF INCORRECT STATEMENTS

The petition includes many statements that are incorrect. A number of the incorrect statements are addressed below. Due to the number of such incorrect statements, not all incorrect statements are necessarily addressed below. The failure to mention any statement below does not constitute an acknowledgment that the statement is correct. Moreover, matters addressed in the foregoing arguments are not repeated below.

Page 3 of the petition states that a prime contractor, agrees in its contract with the governmental entity, that workers will be paid prevailing wages. Sometimes the prime contract does not set forth the obligation to pay prevailing wages. Nevertheless, the obligation exists as a matter of law. *Lusardi supra*.

The DLSE asserts on page 4 that prime contractors who hire G&G agreed in their contracts to certain requirements regarding prevailing wages. No evidence was submitted in that regard. The issue was immaterial. DLSE has asserted, and conceded in the District Court, that its authority to issue notices to withhold is not based on contract. DLSE has asserted, and concedes, that its

authority to issue notices to withhold is statutory, pursuant to its mandate to enforce the Labor Code. The California Supreme Court has held that DLSE's authority does not derive from contract. *Lusardi supra*.

Page 5 of the petition states that monies transmitted to DLSE pursuant to a notice to withhold are disbursed to underpaid workers, if a lawsuit is not filed to recover said monies. There is no evidence in the record that the money is disbursed to underpaid workers. In fact, the money is not necessarily disbursed to underpaid workers. Civil penalties, which constitute a large portion of monies seized, are retained by the state. Moreover, a notice to withhold may be issued, and often is, even if there are no underpaid workers who have been identified. Where no underpaid workers are identified, or if workers cannot be located, the state retains the monies seized for alleged underpayments.

Page 5, in footnote 5, states that the subcontractors may be unknown to the awarding body at the time the contract is awarded. The California Public Contracts Code requires a prime contractor identify all subcontractors in its bid. A subcontractor cannot be removed from the project without the approval of the awarding body, which may be granted only on certain specified statutory grounds. The only instance when an awarding body would not know of the subcontractor, is where it provides such a negligible amount of work that it falls within an exception to the general rule that subcontractors must be listed in the bid.

Page 6 of the petition states that a subcontractor who has been targeted by a notice to withhold may pursue a

remedy under the "stop notice" procedure set forth in the California Civil Code. The stop notice procedure does not provide such a remedy. The stop notice procedure allows any person who is owed money for work or materials at the project, including a subcontractor or worker, to file a stop notice with the awarding body. The stop notice requires the awarding body to withhold the amount of money claimed, pending litigation of the claim. Interestingly, the statutory stop notice procedure provides for due process, by allowing a prompt post-deprivation hearing. DLSE is authorized to file stop notices on behalf of workers, but refrains from doing so. Rather, DLSE uses the notice to withhold procedure, which does not provide due process. Rather than being a remedy for a notice to withhold, a stop notice would only make the subcontractor's situation worse. The DLSE notice to withhold seizes money owing to the prime contractor, and authorizes pass-through withholding of the subcontractor's money. The filing of a stop notice causes even more money to be withheld from the prime contractor. The stop notice is without merit because the prime contractor has not breached the subcontract. The prime contractor is authorized to withhold the same amount from the subcontractor, as damages for the wrongful stop notice. The filing of the stop notice simply causes the subcontractor to suffer a double penalty.

Page 6 of the petition states that G&G disdained utilizing any of its state law remedies, but rather filed this action. To the contrary, G&G filed this action for declaratory and injunctive relief because there is no state remedy which provides for due process.

Page 7 of the petition, footnote 6, states that no party contended that G&G was anything but a subcontractor on the three public works contracts at issue. There had been previous notices to withhold, which had been released. G&G contended that all of the notices to withhold, including those which had been released, combined with the threat of future notices to withhold, gave G&G standing to assert a claim for declaratory and injunctive relief. Notices to withhold had been issued against G&G both as a subcontractor and a prime contractor.

Page 9 of the petition states that a subcontractor targeted by a notice to withhold may sue the awarding body under various state law theories. This is incorrect. The Labor Code provides that the exclusive remedy for a notice to withhold is a lawsuit by the prime contractor or his assignee. *Cal. Labor Code* §§ 1731-1733. No money may be released until final judgment, and exhaustion of all appellate rights. *Krueger, supra.*

Page 18 of the petition states, that it is unknown whether G&G was owed any money under the terms of its contract. This is incorrect. The undisputed facts in the District Court established that the notices to withhold caused withholding of money due and owing to G&G.

VIII. CONCLUSION

The Petition asserts issues which are not raised by the facts of this case. The decision of the Court of Appeals does not conflict with any existing precedent. The Petition asserts a position that has never been adopted by any court, and which conflicts with long standing precedents

of the United States Supreme Court. The Petition sets forth no reason why long standing principles of due process should be abandoned. It is respectfully submitted that the Petition should be denied.

Respectfully submitted,

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ORIGINAL

No. 00-152

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In The

Supreme Court of the United States

October Term, 2000

VICTORIA L. BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California' DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California

Petitioners,

v.

G & G FIRE SPRINKLERS, INC.,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

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4 pp

Respondent G & G Fire Sprinklers, Inc. ("G&G") submits that the motion for leave to file brief of *amici curiae* by the Port of Oakland and ten California cities, should be denied.

The proposed *amici curiae* brief does not address an issue presented by this case.

Counsel for the *amici curiae*, and for Petitioners, have been misstating the issue in the case, in an effort to evade the merits. The proposed *amici curiae* brief contends that the case addresses whether an ordinary contract dispute gives rise to a due process claim. See, proposed *amici curiae* brief, p. 3, fn. 2. No such issue was raised by the case. The Ninth Circuit expressly stated that such an issue was not raised by the case. The irrebuttable facts, and state law, establish that no such issue was raised by the case.

While this action was pending in the Ninth Circuit, counsel for *amici curiae* was provided with detailed explanations, and briefs, which establish that this case does not concern an ordinary contract dispute. Nevertheless, the *amici curiae* brief fails to even address the issue. The proposed *amici curiae* brief, and the petition for writ of certiorari, both engage in mere hand-waving. The *amici curiae* brief simply asserts that this action involves a mere breach of contract, without setting forth any facts or law to support the contention. Overwhelming facts, and state law, which lead the District Court and the Ninth Circuit to conclude otherwise, is completely ignored by *amici curiae*.

Implicitly, the *amici curiae* concedes that an argument on the merits, under the actual facts of this case, is devoid of merit. In fact, such an argument would be directly inconsistent with long-standing precedents of this Court. See, e.g., Fuentes v. Shevin, 407 U.S. 67, 32 L.Ed. 556, 92 S.Ct. 1983 (1972); Sniadach v. Family Finance Corp. 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969); United States v. James Daniel Good Real Property, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993); Goldberg v. Kelly 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970); Mathews v. Eldridge 424 U.S. 319 (1976).

The *amici curiae* brief seeks to confuse the Court as to the issues in the case, in an effort to evade the merits of the case. Accepting a petition for writ of certiorari on an issue which does not

exist in the case would embroil the Court in factual issues regarding state law. The *amici curiae* sets forth no argument whatsoever to dispute the conclusion of the Ninth Circuit on this issue. The *amici curiae* sets forth no argument to support its contention as to the issue in this case, because none exists. The failure of the *amici curiae* to set forth any argument in support of its contention that this case concerned an ordinary breach of contract constitutes an admission, that no such argument can be made.

The proposed *amici curiae* brief refers to dissent by Judge Kozinski. The dissent by Judge Kozinski engages in the same evasion of the issues as the petition, and proposed *amici curiae*. The dissent merely asserts, in an exercise of hand-waving, that the case concerns an ordinary breach of contract by a governmental entity engaging in commercial activity. The dissent sets forth no facts, or analysis of state law to support the assertion. The dissent asserts a breadth to the majority opinion, which cannot possibly be derived from the terms thereof. In fact, the majority opinion expressly states that this case does not involve a contractual dispute.

The *amici curiae* further raises a non-existent issue, by asserting that prior cases have held that a public contract does not create a property interest. This is not the law. Rather, the courts have held that a mere breach of a public contract does not constitute the deprivation of a property interest. It is axiomatic that money due under a contract is a property interest. In fact, it is one of the oldest and most fundamental types of property interests recognized in the United States of America. If there is no property interest in money due under a contract, then a writ of attachment could be issued without due process. Similarly, the federal government could assess civil penalties for alleged violations of federal law, and seize money due under a public works contract with a municipal entity, without due process. Clearly, due process is required for such a seizure. See, United States v. James Daniel Good supra.

The proposed *amici curiae* brief sets forth no facts, or law, to support the contention that this case concerns a mere breach of contract. Rather, the proposed brief completely evades the issue. This

case involves state law enforcement activity. There is a clear distinction between a contractual relationship, which involves a mutuality of obligations, and panoply of contract remedies, on the one hand; and state law enforcement activity, on the other hand.

The motion for leave to file *amici curiae* brief should be denied.

Respectfully submitted,

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No. 00-152

In The

Supreme Court of the United States

VICTORIA L. BRADSHAW, *et al.*,

Petitioners,

vs.

G & G FIRE SPRINKLERS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF AMICI CURIAE THE PORT OF OAKLAND AND TEN CALIFORNIA CITIES IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Pursuant to Rule 37 of this Court, the Port of Oakland, and the cities of Berkeley, Newport Beach, Bakersfield, San Pablo, Sunnyvale, Redding, Lodi, Oakland, Fremont and Tracy ("Amici") move for leave to file the accompanying brief of Amici Curiae in support of Petitioners, Victoria Bradshaw, et al.[1]

Counsel for Amici requested that counsel for Petitioners and Respondent consent to the filing of this brief pursuant to Rule 37. Counsel for Petitioners consented. However, counsel for Respondent declined on the ground that this brief addresses an issue not presented by the decision below. Amici respectfully disagree with Respondent's conclusion and therefore move this Court for leave to file the accompanying brief.

Amici are all public entities that enter into numerous public works contracts in order to construct and maintain vital infrastructure. Because Amici may be directly affected by the decision below, Amici seek to assist this Court in understanding the public interest in resolving a conflict among the circuit courts on an issue of overriding national importance. Amici respectfully submit that additional briefing on this matter is desirable and that, based

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[1] The City Charter of the City of Oakland establishes two legislative bodies to govern municipal affairs: 1) the City Council and 2) the Board of Port Commissioners. (Charter, Art. VII.) The Board of Port Commissioners possesses exclusive control over the city's maritime and aviation operations, and speaks for the city with respect to such matters. (*City of Oakland v. Hogan*, 41 Cal.App.2d 333, 342-345, 106 P.2d 987 (1940).)

on their experience, they may assist this Court in making a sound decision.

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BRIEF OF AMICI CURIAE THE PORT OF OAKLAND AND NINE CALIFORNIA CITIES IN SUPPORT OF PETITIONERS

The Port of Oakland and the cities of Berkeley, Newport Beach, Bakersfield, San Pablo, Sunnyvale, Redding, Lodi, Oakland, Fremont and Tracy ("Amici") submit this brief of amici curiae in support of petitioners Victoria Bradshaw, et al.

STATEMENT OF AMICI CURIAE[1]

A. Identity of Amici

Amici are ten California public entities responsible for building and maintaining roads, bridges, buildings, harbors and airports for use by the public. In fulfilling these responsibilities, Amici award and execute numerous public works contracts in the manner specified by state law and local charters.

B. Interest of Amici

Amici have concluded that this case presents an issue of exceptional importance to municipalities because the holding that an ordinary public works contract creates a protected property interest under the Fourteenth Amendment to the U.S. Constitution is contrary to established precedent in the Second and Third Circuits, and fails

[1] No person or entity, other than Amici, or their counsel, made any monetary contribution to the preparation and submission of this brief.

even to follow long-established precedent in the Ninth Circuit. Moreover, the majority's deviation from established Fourteenth Amendment jurisprudence holds the potential to open an entirely new realm of municipal liability. All cities utilize contractors to deliver municipal services; indeed some cities use contractors for all of their services. (See, Miller, *Cities by Contract: The Politics of Municipal Incorporation*, MIT Press (Cambridge, Mass. 1981).) Unfortunately, disputes with contractors are an unavoidable part of contemporary public works administration. (See, Martin, *Management of Public Works Construction Projects*, pp. 121-122, American Public Works Assoc. (Kansas City, Mo. 1999).) However, if the conflict between the majority decision and established precedent is not resolved, the federal judiciary will become entangled in ordinary public works contract disputes. Moreover, state and local governmental agencies will face the threat of a federal civil rights suit, and a potential attorney fee award under 42 U.S.C. § 1988, in every dispute with a contractor.

C. Source of Authority

Amici are authorized by state law or local charter to participate in any judicial proceedings related to their operations. This brief is filed under the authority of Rule 37.

SUMMARY OF ARGUMENT

The decision below concerns an issue of national importance and conflicts with the decisions of the Courts of Appeals for the Second and Third Circuits; consideration by this Court is therefore necessary to secure and maintain uniformity of the interpretation of the Fourteenth Amendment to the U.S. Constitution. The decision below presents a question of exceptional importance because by holding that an ordinary commercial contract with a public agency creates a property interest within the meaning of the Fourteenth Amendment, it will result in a federal cause of action for every breach of a public contract. Moreover, the decision below will seriously impede the development and maintenance of vital public infrastructure.[2]

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[2] Amici agree with Petitioner's argument that G & G failed to prove the required element of state action as necessitated by *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999). However, as Amici explain, the majority opinion is also fatally flawed in that it holds that an ordinary commercial contract with a public entity creates a protected property interest, sufficient to create a federal cause of action in an ordinary contract dispute.

I.

THE DECISION BELOW CONFLICTS WITH PRECEDENTS OF THE SECOND AND THIRD CIRCUITS, AND EVEN FAILS TO FOLLOW BINDING PRECEDENTS OF THE NINTH CIRCUIT ITSELF, ALL OF WHICH HOLD THAT AN ORDINARY COMMERCIAL CONTRACT WITH A PUBLIC ENTITY DOES NOT CREATE A PROTECTED PROPERTY INTEREST UNDER THE FOURTEENTH AMENDMENT

"The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty'." (*American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S.Ct. 977, 990, 143 L.Ed.2d 130 (1999).) In the decision below, the majority concluded that a corporation's public works contract created a protected property interest under the Fourteenth Amendment. The majority holding conflicts with prior precedent from Second and Third Circuits, and fails even to follow binding precedent from the Ninth Circuit.

The Court of Appeals for the Second and Third Circuits have held that an ordinary commercial contract with a public entity does not create a property interest protected by due process. (*S & D Maintenance Co., Inc. v. Goldin*, 844 F.2d 962 (2nd Cir. 1988); *Unger v. National Residents Matching Program*, 928 F.2d 1392, 1397-1400 (3d Cir. 1991); *Martz v. Incorporated Village of Valley Stream*, 22 F.3d 26 (2nd Cir. 1994).) Prior to the issuance of the decision below, Ninth Circuit precedent had also rejected any theory that an ordinary public contract created a protected property interest. (*San Bernardino Physicians' Services Medical Group v. County of San Bernardino*, 825 F.2d

1404 (9th Cir. 1987).) *S & D, Unger, Martz* and *San Bernardino Physicians* are each authoritative decisions in that a central issue on appeal was the existence of any protected property interest created by an ordinary commercial contract with a public entity and in each case the court's holding is supported by a thorough analysis of the relevant authorities.

In *S & D, supra,* the Second Circuit considered whether a municipal contract to maintain parking meters in New York City created a protected property interest. There, the city withheld payments and eventually terminated the contract under a no-cause termination provision in the contract. After exhaustive analysis, the panel unanimously held that S & D's contract created no property interest under the Fourteenth Amendment: "[A]n interest in enforcement of an ordinary commercial contract with the state is *qualitatively different* from the interests the Supreme Court has thus far viewed as 'property' entitled to procedural due process protection." (*S & D, supra,* 844 F.2d, at 966 [emphasis added].)

In *Unger, supra,* the plaintiff alleged that a public medical school deprived her of a protected property interest when it discontinued its residency program after it had accepted her application. After an extensive review of the other federal precedents, including the Ninth Circuit's opinion in *San Bernardino Physicians, supra,* the Third Circuit held that the plaintiff's contract with the medical school created no protected property interest. (*Unger, supra,* 928 F.2d, at 1399.)

In *Martz, supra,* the plaintiff attorney had been retained to provide legal services for a municipality. As a

result of a dispute, the village failed to compensate the plaintiff for the services rendered and she filed an action under 42 U.S.C. § 1983 ("Section 1983") alleging deprivation of her property in violation of the Fourteenth Amendment. Reiterating its holding from *S & D, supra,*, the court rejected the plaintiff's Section 1983 claim, explaining that the right to payment on an ordinary commercial contract does not rise to the level of a constitutionally protected property interest. (*Martz, supra,* 22 F.3d, at 31; citing, *San Bernardino Physicians, supra.*)

The Ninth Circuit's decision below fails even to follow the binding precedent from that circuit in *San Bernardino Physicians, supra.* There, a medical services corporation entered a contract with the county which could be terminated only "for cause." (*Id.*, at 1406.) However, the county breached the contract by terminating it prematurely. The medical group filed an action under Section 1983 alleging deprivation of property without due process of law under the Fourteenth Amendment. On appeal from summary judgment in favor of the county, the Ninth Circuit held the medical services contract was an ordinary commercial contract which did not create a protected property interest.

In its analysis, the Ninth Circuit acknowledged that a contract may, in some circumstances, create a protected property interest. But, recognizing the practical problems with conferring constitutional protection on every public contract, the Court set out to "determine what kinds of contracts with the state create rights that are protected by the Fourteenth Amendment." (*Id.*, at 1409.) Essential to the court's determination was the fact that employment

contracts, which have been the basis for nearly all successful contract-based Section 1983 actions, relate to an interest of overriding importance to *the individual.* Employment is more easily characterized as a civil right than the transitory business interest embodied in an ordinary commercial contract. Therefore, an ordinary commercial contract does not create a protected property interest simply because one party is a public entity. Of special significance to the instant matter, the court observed:

> . . . Physician's Group's contract to supply medical services to the state does not confer any constitutionally protectible interest on Physician's Group . . . [I]ts contract to supply services to the state cannot sensibly be distinguished from *construction contracts* or even purely material supply contracts, for purposes of federal protection. (*San Bernardino Physicians, supra,* 825 F.2d, at 1410 [emphasis added].)

The majority opinion in *G & G Fire Sprinklers* does not respect the carefully crafted reasoning of the authoritative decisions from the Second and Third Circuits. (See, *G & G Fire Sprinklers, supra,* 156 F.3d, at 908-909 [Kozinski, J., dissenting].) Nor does the decision below follow binding Ninth Circuit precedent. In each prior case, plaintiffs alleged the deprivation of a protected property interest arising from an ordinary commercial contract with a public entity. Indeed, the *San Bernardino Physicians* court specifically identified "construction contracts", such as the G & G contract, to illustrate the types of contracts which *do not* create a protected property interest. (*San Bernardino Physicians, supra,* 825 F.2d, at 1410.) Even the

inclusion of a "for cause" termination provision did not warrant a different result in *San Bernardino Physicians*.

The decision in *G & G Fire Sprinklers* cannot be reconciled with the above authorities. In the decision below, the majority's attempt to avoid a conflict with other circuits by focusing on the statutory scheme of the California Labor Code, rather than the terms of the contract, is simply unavailing. (*G & G Fire Sprinklers v. Bradshaw*, 204 F.3d 941, 943 (9th Cir. 2000).) Clearly, G & G's property interest did not arise from the Labor Code itself. Similarly, characterizing G & G's property interest as an expectation of receiving payment is insufficient, since any such expectation must be rooted in the contract. In its original decision, the majority itself noted that "G & G's interest arises from its public works contract." (*G & G Fire Sprinklers, supra*, 156 F.3d, at 901.) This result cannot be squared with the precedents in *S & D, Unger, Martz* and *San Bernardino Physicians*.

In sum, the majority opinion creates an irreconcilable conflict with Second and Third Circuit precedents by recognizing a protected property interest arising out of an ordinary commercial contract with a public entity. This Court should grant the writ in order to resolve this conflict.

II.

THE DECISION BELOW WILL ENTANGLE THE FEDERAL JUDICIARY IN STATE AND LOCAL PUBLIC WORKS CONTRACT DISPUTES.

As a practical matter, the decision below will entangle the federal judiciary in disputes between state and

local governments, on the one hand, and public works contractors on the other, by converting a broad range of ordinary contract disputes into civil rights actions.

Over twenty years ago, this Court expressed a concern that the day-to-day operations of state and local governments may become subject to constitutional review as the result of a limitless definition of "property interests." In *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), county law enforcement officials distributed flyers to local merchants depicting the plaintiff among a list of "active shoplifters." The plaintiff filed suit against the officials under 42 U.S.C. § 1983, alleging that the county had deprived him of his protected liberty and property interests without due process of law. In rejecting this claim, this Court observed:

> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and sheparded the adoption of that Amendment to learn that it worked such a result, a study of our decisions convinces us they do not support the construction urged by respondent. (*Paul, supra*, 424 U.S., at 698-699, 96 S.Ct., at 1159, 47 L.Ed.2d 405.)

The identical concern expressed by this Court in *Paul v. Davis* is presented in the decision below. To paraphrase this Court's holding in *Paul v. Davis*, the Ninth Circuit's reasoning would seem almost necessarily to result in

every breach of a public works contract by a state or local agency establishing a violation of the Fourteenth Amendment. As noted by Judge Kozinski, the result adopted by the majority opinion will effectively "constitutionalize" a broad swath of garden variety contract disputes simply because one of the parties is a government agency. (See e.g., *G & G Fire Sprinklers, supra,* 156 F.3d, at 909.) At least 16 other federal judges have expressed the same concern.[3]

III.

THE DECISION BELOW WILL SERIOUSLY IMPEDE THE DEVELOPMENT AND MAINTENANCE OF VITAL PUBLIC INFRASTRUCTURE BY CONVERTING ORDINARY CONTRACT DISPUTES INTO FEDERAL CIVIL RIGHTS CLAIMS WHICH ALLOW FOR INDIVIDUAL LIABILITY AND PREVAILING PLAINTIFF ATTORNEY'S FEES UNDER 42 U.S.C. § 1988.

In his dissenting opinion in the original *G & G Fire Sprinklers* decision, Judge Kozinski identified with striking clarity the detrimental impact the majority opinion will have on state and local governments. (*G & G Fire Sprinklers, supra,* 156 F.3d, at 909-910.) Amici shares Judge Kozinski's concern that the majority holding will hobble

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[3] See, *S & D, supra,* 844 F.2d 962 [Feinberg, Newman, Winter, JJ.]; *Unger, supra,* 928 F.2d 1392 [Hutchinson, Resenn, JJ.]; *Martz, supra,* 22 F.3d 26 [Miner, Mahoney, Restani, JJ.], *San Bernardino Physicians, supra,* 825 F.2d 1404 [Hug, Canby, Norris, JJ.]; *Walentas v. Lipper,* 862 F.2d 414 (2nd Cir. 1988) [Mahoney, Winter, JJ.]; *Reich v. Beharry,* 883 F.2d 239 [Seitz, Stapleton, Cowan, JJ.].

the ability of public entities to construct and maintain vital public improvements.

Two aspects of Section 1983 liability will fundamentally alter the dynamics of public works administration to the detriment of the public. First, the decision below will discourage vigorous protection of the public fisc by permitting imposition of individual liability upon project managers, engineers and administrators. (See, e.g., *Hafer v. Melo,* 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991).) As noted by Judge Kozinski, "when the government is acting as a commercial entity, taxpayers cajole it to act with all the ferociousness the marketplace demands." (*G & G Fire Sprinklers, supra,* 156 F.3d, at 910, n.2.) Self-evidently, the prospect of individual liability under Section 1983 will discourage public works managers from vigorously enforcing the terms of commercial contracts in order to obtain complete performance. The taxpayers will bear the consequences in the form of higher costs and delayed completion of critical public improvements.

Second, as the instant case illustrates, liability under Section 1983 carries with it the right to prevailing plaintiff attorney's fees under 42 U.S.C. § 1988. Under California law, parties to an ordinary breach of contract action are entitled to recovery of attorney's fees only if their contract specifically provides such a remedy. (Cal. Civ. C. § 1717 (Deerings 1994); *Excess Electronixx v. Heger Realty Corp.,* 64 Cal.App.4th 698, 75 Cal.Rptr.2d 376.) However, as a practical matter, the majority opinion may result in the imposition of a significant contract remedy in every public works contract, regardless of the mutual assent of the parties.

The contours of the expanded zone of Section 1983 liability which might result if this conflict is not resolved are suggested by the frequency with which payments are withheld from contractors in the course of a construction project. The withholding or partial withholding of payments by a project owner is an inherent feature of construction projects, whether privately or publicly owned. (See, Sweet & Sweet, *Sweet on Construction Industry Contracts-Major AIA Documents*, § 15.11 (4th Ed.) Aspen Law & Business 1999.) Moreover, in California numerous statutes authorize or require state and local agencies to withhold funds from a contractor for such reasons as failure to execute a contract after award (Cal. Pub. Con. C., §§ 10164, 10781, 10782, 20103.5, 20172, 20418 (Deerings 1994)), as liquidated damages (Cal. Pub. Con. C. §§ 10226, 10826 (Deerings 1994), see also, Cal. Comm. C. § 2717), due to disputes regarding amounts due (Cal. Pub. Con. C. § 7107, § 10262.5 (Deerings 2000 supp.)), and in order to protect the rights of a subcontractor or supplier (Cal. Civ. C. § 3186 (Deerings 2000 supp.)). Indeed, the construction industry's own standard contract specifications make frequent use of this commercially accepted practice. (Public Works Standards, Inc., *Greenbook: Standard Specifications for Public Works Construction* (2000 ed.) § 4-1.1 (deduction for defective materials or work); § 6-2 (deduction for failure to provide for public safety, traffic and protection of work); § 6-9 (liquidated damages) (BNI Publications, Los Angeles, 1999).)

CONCLUSION

The Court should intervene now and halt any further propagation of the mistaken notion that an ordinary public works contract creates a protected property interest under the Fourteenth Amendment. Based on the foregoing, Amici urge the Court to grant the Petition for Writ of Certiorari and reverse the Court of Appeals decision.

Dated: August 25, 2000

Respectfully submitted,

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No. 00-152

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In The

Supreme Court of the United States

ARTHUR S. LUJAN, an individual, in his official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California,

Petitioners,

v.

G&G FIRE SPRINKLERS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' BRIEF

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QUESTIONS PRESENTED

1. Whether the discretionary withholding of funds by a prime contractor from his subcontractor, where authorized by statute, constitutes state action.

2. Whether a subcontractor who has not alleged that he has an entitlement to public funds can state a claim for denial of due process based on the state's withholding of said funds from his prime contractor.

3. Whether nonpayment to a private contractor by a state agency under the terms of a commercial contract constitutes a deprivation of due process.

4. Whether a post-deprivation hearing pursuant to common law or statutory remedies satisfies the requirements of due process.

5. Whether a subcontractor not targeted by a withholding statute suffers a denial of due process where his loss is at most indirect.

LIST OF PARTIES

Arthur S. Lujan[1], Lloyd W. Aubry, Jr.[2], Daniel Dellarocca, Roger Miller, Rosa Frazier, the Division of Labor Standards Enforcement, and the Department of Industrial Relations of the State of California are the petitioners herein. G&G Fire Sprinklers, Inc., a subcontractor on construction projects, is the respondent.

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[1] Arthur S. Lujan is the Labor Commissioner of the State of California, a position Victoria Bradshaw held when this litigation commenced.

[2] Lloyd W. Aubry, Jr., was sued in his official capacity as Director of the Department of Industrial Relations of the State of California, a position he held when this litigation commenced. Stephen Smith is the current Director.

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OPINIONS AND ORDERS

The judgment of the District Court, entered on November 9, 1995, is not officially reported but is reprinted in Volume II, p. 372 of the Joint Appendix. The original opinion of the United States Court of Appeals for the Ninth Circuit is officially reported at 136 F.3d 587 (9th Cir. 1998) and is reprinted at A-52 of the Petition. The Ninth Circuit issued a subsequent order and amended opinion on September 10, 1998, officially reported at 156 F.3d 893 (9th Cir. 1998), and reprinted at A-16 of the Petition. Following the October 28, 1998 order denying the petition for rehearing, the State filed a Petition for Writ of Certiorari with this Court, which petition was granted on April 19, 1999 (526 U.S. 1061). This Court summarily vacated the judgment below and remanded the case for further consideration in light of *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 119 S.Ct. 977 (1999). The Ninth Circuit issued yet a third opinion in this case on February 23, 2000, officially reported at 204 F.3d 941 (9th Cir. 2000) and reprinted at A-1 of the Petition.

JURISDICTION

The Ninth Circuit issued its amended opinion and order on February 23, 2000. A timely petition for rehearing and rehearing en banc was denied on May 1, 2000. The petition for writ of certiorari was filed within ninety days of the denial of rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . "

42 U.S.C. § 1983 provides, in relevant part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The relevant California statutory provisions are reproduced in the appendix to the Petition at A-77, and include California Labor Code §§ 1720, 1727, 1729, 1730, 1731, 1732, 1733, 1771, 1772, 1773, 1773.2, 1774, 1775, 1776, and 1813, and California Civil Code §§ 3103, 3110, 3181, 3184, 3186, 3210, 3245, 3250.

STATEMENT OF THE CASE

A. Material Facts

Respondent, G&G Fire Sprinklers, Inc. (hereinafter "G&G"), a fire protection company that installs fire sprinkler systems, contracted as a subcontractor with certain

prime contractors on certain "public works"[3] projects with California governmental agencies during 1995. (Jt. App. 18, 20-21, 64, 67.)

California, like many other states, has adopted a prevailing wage law (California Labor Code §§ 1720-1861) applicable to public works projects undertaken within its geographical boundaries. Under this law, enacted in 1931, the State pays a premium for construction work done on public projects and in consideration of such premium requires all contractors working on these projects to pay their employees "prevailing wages" in the construction industry. The prime contractor agrees, in his contract with the governmental entity, that its construction workers, and the workers of the subcontractors whom he later selects to perform the contract, will be paid prevailing wages[4] as required by California Labor Code §§ 1771 and 1774. Section 1775 mandates that the prevailing wage requirement is incorporated into and becomes a part of the contract. The governmental awarding body is required by § 1772 to withhold funds otherwise due to the prime contractors where there are violations of the prevailing wage requirement, so that this money can be held for and eventually paid to the affected workers.

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[3] The term "public work" is defined at Cal. Labor Code § 1720 to include "construction, alteration, demolition, or repair work done under contract and paid in whole or in part out of public funds. . . . "

[4] Prevailing wages are fixed for each construction craft or classification in the locality in which the public work is performed. The procedure for determining prevailing wages is set out at Cal. Labor Code § 1773.

Each of the prime contractors that subcontracted work to G&G on these projects was accordingly required by law to agree to the following contractual provisions in their public works contracts with the respective public awarding bodies: (1) that prevailing wages would be paid to all workers employed on the project, whether by the prime contractor or its subcontractors, (2) that certified payroll records would be kept, and provided to the Division of Labor Standards Enforcement (hereinafter "DLSE") upon request, showing the hours worked and wages paid to all workers employed on the project by the prime contractor and its subcontractors, and (3) that the public agencies that had awarded the contracts could withhold contract payments to these prime contractors to cover unpaid wages and penalties if the agreements were breached.

DLSE, pursuant to California Labor Code § 1727, having discovered after investigation certain prevailing wage law violations by G&G, i.e., the failure to pay prevailing wages, concerning three separate projects undertaken by G&G, issued notices to the awarding bodies to withhold contract payments from the prime contractors on these projects. This investigation also disclosed a failure by G&G to provide DLSE with certified payroll records, an additional violation of law. Following issuance of notices to withhold from DLSE, the awarding bodies for each of the projects withheld money from the prime contractors. The prime contractors, in turn, withheld from G&G payments allegedly otherwise due under their subcontracts, as authorized by California Labor Code § 1729 "on account of G&G's failure to comply"

with the prevailing wage requirements. (Jt. App. 21, et seq., 67, et seq.).

Following the prime contractors withholding from G&G, it appears that G&G did not obtain an assignment of any of its prime contractors' rights to sue to recover the funds withheld by the State under California Labor Code § 1730-1733. G&G did not assert that it was subrogated to the rights of the prime contractor against the State under the doctrine of equitable subrogation. Furthermore, it did not pursue any common law remedy existing under California law, including an action for breach of contract for damages, recission, or restitution. It did not pursue its rights under the stop notice provisions of the California Civil Code, consisting, *inter alia*, of the right to file a stop notice, setting forth the amount owed by the prime contractor to the subcontractor for work performed under the subcontract. Finally, it did not commence an action against the prime contractors' payment bonds pursuant to the applicable provisions of the California Civil Code. In other words, G&G did not avail itself of any existing state law remedy in challenging the withholding of funds.

B. The District Court Proceedings

G&G brought this action for declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201-2202 in the United States District Court for the Central District of California, claiming that the issuance of the notices to withhold by the State without a prior hearing constituted a deprivation of property without

due process of law, in violation of the Fourteenth Amendment. G&G alleged therein that the notices to withhold issued by petitioners were "wrongful, incorrect, excessive" and "arbitrary and unreasonable." (Jt. App. 69) G&G did not, however, allege in the initial Complaint or the First Amended Complaint, either in *haec verba* or in substance, the existence of an agreement between it and any of its prime contractors in connection with the projects which are the subject matter of this action. (Jt. App. 16, et seq., 62, et seq.) It also failed to allege that it had performed all conditions precedent to these contracts if any; and it further failed to allege that it had complied in all respects with the provisions of the prevailing wage law.

The State responded with a motion to dismiss, and G&G shortly thereafter filed a motion for summary judgment (Jt. App. 79, et seq., 143, et seq.). The district court denied the state's motion to dismiss and granted G&G's motion for summary judgment. The district court's judgment declared §§ 1727, 1730-1733, 1775, 1776(g) and 1813 of the California Labor Code unconstitutional, and enjoined the state from enforcing those statutes against G&G. (Jt. App. 372).

Petitioners filed a timely notice of appeal from this judgment. (Jt. App. 392).

C. The Ninth Circuit Proceedings

On February 3, 1998, Judge Hawkins, joined by Judge Reinhardt, issued an opinion, in part affirming and in part reversing the district court, and remanding the case for further proceedings consistent with the opinion.

Judge Kozinski vigorously dissented. The panel majority held that due process requires that the state provide a subcontractor with either a pre- or prompt post-deprivation hearing when withholding payments from a public works contractor for unpaid wages or penalties. This holding is founded upon the majority's view that a subcontractor "has a property interest in being paid in full for the construction work it completed," and that this interest, which "arises from *its*[5] public works contract", is protected by the Due Process Clause. 136 F.3d at 595-597. (Pet. A-63). The panel also concluded, however, that the district court's injunction was overbroad in that the challenged withholding provisions, while unconstitutional as applied, were not facially invalid. (Pet. A-72 to 73).

In his dissent, Judge Kozinski protested the majority's "categorical approach that turns every right to receive payment on a public works contract into a property right protected by due process." 136 F.3d at 602. (Pet. A-80). Instead, Judge Kozinski maintained that any rights arising under commercial contracts, such as service contracts, material supply contracts, and construction contracts, are not protected by the Due Process Clause.

Judge Kozinski warned that the majority decision not only conflicts with the opinions of other circuits, but that it is "very bad policy" because it saddles the state, when

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[5] No party contended at any stage in this litigation that G&G, with respect to the three public works contracts at issue herein, was anything but a subcontractor – i.e., that it (rather than the prime contractors) had entered into any contracts with these public agencies.

it engages in "the purely commercial activity of construction", with "a burden not suffered by private builders", who routinely put provisions for payment withholdings for failure (or suspected failure) of performance into their private construction contracts. 136 F.3d at 602. (Pet. A-81 to 82). Judge Kozinski explained that payment withholdings are consistent with the awarding bodies' activities as market participants, and that any contractor or subcontractor who objects to provisions for withholdings is free not to do business with the state. Consequently, a dispute over withholdings is nothing more than a "run-of-the-mill contract dispute", for which the subcontractor's remedy lies in a state court breach of contract action against the prime contractor, or, as an assignee of the prime contractor, against the awarding body. 136 F.3d at 603. (Pet. A-82 to 83).

Finally, Judge Kozinski cautioned that drastic consequences would result from the majority decision, as due process requirements would inexorably apply to *any* withholding of payments under any commercial contract with the state, be it a withholding for failure to pay prevailing wages, or in more mundane instances, a failure to complete a project on time or a failure to comply with applicable building codes. (Pet. A-83 to 84).

The State petitioned for rehearing. This petition was granted, and on September 10, 1998, the panel issued an amended opinion and order. 156 F.3d 903. Once again, the panel split, with Judge Kozinski in the minority. The only significant change in the majority's opinion is its concession that "the state's interest in ensuring payment of prevailing wages is sufficiently important to justify the withholding of funds pending the outcome of whatever

kind of hearing may be afforded." 156 F.3d at 903 (Internal citation and quotation omitted.) (Pet. A-35 to 36). Thus, the majority concluded that a pre-deprivation hearing is not required, but that a prompt post-deprivation hearing is necessary to satisfy due process requirements.

In his dissent to this amended opinion, Judge Kozinski found that under California law, every subcontractor who wishes to challenge a withholding has an adequate state law remedy. Under California Labor Code § 1733, a subcontractor with an assignment from the contractor can file a breach of contract action against the awarding body to recover sums withheld. Furthermore, Judge Kozinski noted, any subcontractor unable to obtain an assignment but whose payment had been withheld by the prime contractor could bring suit against the awarding body under various state law theories. 156 F.3d at 909. (Pet. A-50).

The panel majority, however, concluded that even if the aggrieved subcontractor could bring an action on the contract, such an action would not be sufficient. While conceding that this Court has held that in certain circumstances, a post-deprivation state court action may fulfill the requirements of due process, the majority held that the right to bring a breach of contract action to recover withheld payments, when the withholding was carried out by state officials pursuant to state policy, would not provide adequate due process. (Pet. A-20).

On October 28, 1998, the court entered an order denying a petition for rehearing, indicating however that Judge Kozinski had voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

D. Certiorari in the Supreme Court

Petitioners petitioned for a Writ of Certiorari. This Court granted the petition on April 10, 1999, summarily vacating the Ninth Circuit's judgment and remanding the case back for further consideration in light of *American Manufacturers Mutual Insurance Co. v. Sullivan, supra.*

E. Additional Proceedings in the Ninth Circuit

Following additional oral argument, the Ninth Circuit issued a third opinion on February 23, 2000. Determining that its prior reasoning "fits comfortably within the analytic framework set forth in *Sullivan*", Judges Hawkins and Reinhardt reinstated the prior judgment and opinion 204 F.3d 941. (Pet. A-7). Judge Kozinski again vigorously dissented, observing that "*Sullivan* fits the majority's rationale about as comfortably as Cinderella's slipper on the wicked step-sister's foot." (Pet. A-7). He pointed out as well that, under the analysis mandated by this Court in *Sullivan*, the withholding by the prime contractor of funds from G&G was purely private conduct. Continuing on, he opined that the claim of G&G did not qualify as a valid property interest without a showing that G&G had met the prevailing wage requirements. (Pet. A-8 to 11).

F. Legislative Changes

The Governor of California signed Assembly Bill 1646 on September 29 of this year. That new law repeals certain provisions of the California Labor Code (as specifically noted therein) and adds new language providing procedures for an appeal and hearing for both subcontractors and prime contractors in the event of a withholding by the State due to an alleged prevailing wage violation.[6]

SUMMARY OF ARGUMENT

The act of the prime contractors in withholding funds from G&G, their subcontractor, even though authorized by state statute, did not constitute state action within the meaning of 42 U.S.C. § 1983 because this action remained within the sole discretion of these prime contractors and the prime contractors were not subject to any penalty imposed by the State if they chose not to withhold. The District Court had no jurisdiction to hear this matter because the prime contractors did not act under color of law in withholding these funds from G&G.

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[6] The text of the new law, which is not effective until July, 2001, is attached in an appendix hereto. A number of cases which arose after the decisions of the Ninth Circuit in this case nevertheless remain pending under the existing statutory provisions of the prevailing wage law that are being challenged in this case. The combined prayer for these cases exceeds $1,000,000.00. It is anticipated similar new challenges will be filed in the courts as well prior to the effective date of the new law.

G&G has failed to plead the necessary elements sufficient to show entitlement to the funds withheld, i.e., it has not alleged the existence of any contract between it and the prime contractors; or that it complied with the prevailing wage law; or even that it performed all conditions entitling it to payment under said contract.

A subcontractor contracting with the prime contractor on a public works project has no property right to payment from the state within the meaning of the Due Process Clause of the Fourteenth Amendment. In acknowledging such a right for the first time the Ninth Circuit found contrary to all other courts that have entertained the question.

G&G failed to avail itself of other valid, existing remedies under California law for recovery of the sums allegedly wrongfully withheld, including a common law breach of contract action against the prime contractor, a suit on the theory of equitable subrogation, and actions under alternative statutory remedies designed to afford the relief sought here.

Being only indirectly impacted by the State's withholding of payments, an action taken by the State solely against the prime contractors, G&G has not stated a claim for relief for deprivation of due process.

ARGUMENT

I

THE DISTRICT COURT WAS WITHOUT JURISDICTION BECAUSE THE DEPRIVATION OF PROPERTY COMPLAINED OF BY G&G WAS NOT PURSUANT TO STATE ACTION

Upon the initial granting of certiorari by this Court on April 10, 1999, and the consequent vacating of the Ninth Circuit's decision, this case was remanded for further consideration in light of this Court's decision in *American Manufacturers Mutual Insurance Co. v. Sullivan supra*, 526 U.S. 40. The instructions of this Court in remanding the case were explicit and unambiguous: G&G's rights in this action, if any, were to be reexamined in light of the express teachings of *Sullivan*.

In *Sullivan*, the respondent claimants attacked on due process grounds a Pennsylvania law authorizing the withholding by private insurers of their medical benefits in workers compensation cases without a hearing where the insurer submitted a form to the State contesting the reasonableness or necessity of the treatment provided. Respondents argued that these benefits could not be withheld by the insurers without a hearing. An issue also arose concerning whether the withholding of medical payments pursuant to the Pennsylvania law by the insurers constituted state action within the meaning of 42 U.S.C. § 1983. This Court rejected all of respondents' arguments, expressly finding, *inter alia*, that the withholding by the insurers was not state action.

When the operative facts in this case are examined with respect to the issue of private versus state action, they prove to be strikingly similar to those in *Sullivan*. G&G was a subcontractor under a public works contract. California law authorizes DLSE to issue a notice to withhold funds from the prime contractor on a public works project if his workers or the workers of his subcontractors have not been paid the prevailing wage. Upon issuance of the notice to withhold, the awarding body withholds an equivalent amount from the funds otherwise due the prime contractor. California Labor Code §§ 1727, 1774, 1775. There is no requirement in the law that the prime contractor must withhold all or any part of that sum from the subcontractor. The awarding body does not itself deduct any funds from the subcontractor. Section 1729, however, allows the prime contractor to deduct a like amount from its payments to the subcontractor "on account of the subcontractor's failure to comply with" the prevailing wage law. But the prime contractor may choose not to do so. Here, funds were withheld from G&G's prime contractors after the issuance of notices to withhold pursuant to these code sections and the prime contractors decided, in their sole discretion, and as a self-help remedy, to deduct a like amount from the money they presumably owed G&G.

Where state action is in issue, the inquiry must begin with the threshold principle that § 1983 "excludes from its reach merely private conduct, no matter how discriminatory or wrongful." *Sullivan*, 526 U.S. 40, 50 (1999). Under this basic tenet of law, the federal courts have no jurisdiction over a 1983 action unless the plaintiff can plead and prove state action.

The issue of state action under § 1983 has often been litigated in the federal courts, with the result that several well-established principles have emerged. Thus, it has long since been concluded that the fact, standing alone, "that a business is subject to state regulation does not convert its action into that of the State for purposes of the Fourteenth Amendment." *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed. 2d 534 (1981); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350, 95 S.Ct. 449, 42 L.Ed. 2d 477 (1974). It is also clear that a plaintiff seeking relief under § 1983 must affirmatively show "a sufficiently close nexus" between the State and the challenged action so that "the latter may be fairly treated as that of the State itself." *Blum, supra*, 457 U.S. at 1004. Finally, the State can be held responsible for private action "only when it has exercised coercive power or has provided significant encouragement, either overt or covert, that the choice must in law be deemed that of the State." *Blum, supra*, 457 U.S. at 1004; *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 166, 98 S.Ct. 1789, 56 L.Ed. 2d 185 (1978).

In deciding *Sullivan*, this Court expressly confirmed these longstanding principles. Its opinion points out that "action taken by private entities with the mere approval or acquiescence of the State is not state action." Going further, in words that echo resoundingly in this case, this Court stated that it had never declared that "[t]he mere availability of a remedy for wrongful conduct even where that remedy serves important public interests, so significantly encourages the private entity so as to make the State responsible for it." 526 U.S. 40, 53.

Careful analysis of the principles enunciated in *Sullivan* manifestly compels the overturning of the Ninth

Circuit's unwarranted application of the state action doctrine to the facts of this case. In *Sullivan*, as here, the state law authorized a private business to withhold funds under certain conditions. The insurers in *Sullivan were permitted to* withhold payment if they suspected that the treatment provided by the physician or other care giver was not reasonable or necessary and filed a form with the state to that effect. Here, the prime contractors are permitted to withhold payment due a subcontractor if they believe the subcontractor has failed to comply with prevailing wage obligations. In both cases the applicable statute does not mandate withholding by the regulated party, it only permits it. The decision whether or not to withhold is in the ultimate discretion of the private party, not the sovereign. Here, too, "the State's decision to allow the prime contractors to withhold payments . . . can just as easily be seen as state inaction. . . . " 526 U.S. at 53.

There can accordingly be no logical distinction between the effect of the withholding sanctioned by California law in this case and the effect of the withholding which survived judicial scrutiny in *Sullivan*. If anything, there is arguably lesser participation by the State in this case than there was in *Sullivan*, since there the actual withholding required government approval, albeit pro forma approval, while here no official approval is mandated by law prior to withholding. Otherwise, with respect to the operative factors discussed by this Court, this case and *Sullivan* are indistinguishable in law. The result in *Sullivan* with respect to the issue of state action clearly compels a similar result in this case.

As in *Sullivan*, all the State did here was to provide a remedy to the prime contractor, a remedy for relief from

the subcontractor's violations of the prevailing wage law. The State of California did not mandate utilization of this remedy any more than the State of Pennsylvania mandated withholding in *Sullivan*. The teaching of *Sullivan* is unequivocal: "[p]rivate use of state-sanctioned private remedies does not rise to the level of state action." 526 U.S. 40, 53.

The conclusion below was that the "withholding here was specifically directed by State officials in an environment where the withholding party had no discretion at all" 204 F.3d at 944. (Pet. A-6 to 7). This statement, the factual cornerstone of the reasoning of the Ninth Circuit with respect to this issue, represents a confusion of two separate and distinct events. It refers both to the issuance by DLSE of notices to withhold to the awarding body, and the mandatory withholding by that body from the prime contractors, on the one hand, and the discretionary withholding from G&G by the prime contractors, on the other. But the actual withholding by the prime contractor of money purportedly due G&G, which is the act complained of in this case, consists solely of the election of the prime contractors, private parties. The prime contractor under this statutory scheme has the absolute power to withhold or not withhold and is not subject to penalty or forfeiture of any kind from the State regardless of his decision. If the rest of the court below was confused about this distinction, Judge Kozinski was not, as he correctly points out in his dissent:

> "This would be true had the prime contractor been ordered, under penalty of law, to withhold funds from G&G. It was not. The only entity 'specifically directed' to withhold funds was the

awarding body, which withheld funds only from the prime contractor, not from G&G. While the challenged provisions *authorized* – even *encouraged* – the prime to withhold an equivalent amount from G&G, the prime was free to pay G&G the full amount specified by the contract. *Sullivan* clearly holds that mere authorization and encouragement do not render a private entity's decisions 'fairly attributable' to the state. 119 S.Ct. at 986. Under *the reasoning of Sullivan*, then, the prime contractor who chose to deprive G&G of funds was not a state actor". 204 F.3d 934-935. (A-18 to 19).

Here, as in *Sullivan*, there is no evidence before the Court to show that the action of the private entity complained of was the result of either the "coercive power" or "significant encouragement" of the State. The evidence, in fact, is plainly to the contrary. The prime contractor may indeed under the particular circumstances prevailing at the time find it in his business interest to withhold funds from the subcontractor, but he clearly need not do so, and, again, he need fear no adverse response from the State if he chooses not to withhold, the State being satisfied in the first instance to receive the money it claims is owed to the workers.

In both this case and in *Sullivan*, the last link in the chain of action was a private one, requiring the exercise of private discretion before the determination was made whether there was or was not to be withholding from the subcontractor. The fact that the prime contractors in fact chose to withhold from G&G does not alter our analysis. The common and controlling fact in both this case and *Sullivan* is that the final act was entrusted to a private

party who either could have withheld or not withheld in its sole discretion.

The reasoning in the decision below, as pointed out, *supra*, is grounded on a misconceived assumption, i.e., that the prime contractor had no choice but to continue the chain of conduct initiated by the State and withhold from the subcontractor. This perception has no support in the record and is plainly at variance with the true circumstances. The undisputed truth is that a prime contractor in this situation has the absolute discretion to either withdraw or not withdraw funds from the subcontractor. It is not compelled to do the former and can freely choose to do the latter without fear of reprisal.

G&G's claim here accordingly lacks a fundamental jurisdictional element under § 1983, the key factor of state action. It is evident from the record that G&G will never be able to cure this inherent defect in its case. The decision below must be overturned on this ground at least, since it goes to the power of the District Court to hear the matter.

II

G&G FAILED TO SUSTAIN ITS BURDEN OF SHOWING THE EXISTENCE OF A LEGALLY COGNIZABLE ENTITLEMENT TO THE FUNDS IN QUESTION

This Court further held in *Sullivan* that the workers compensation claimants in that case had not established a property right to a hearing because they had not made a showing of the basic elements of entitlement to the money withheld, i.e., they had not established that the

medical treatment in question was reasonable and necessary. Having failed to make this mandatory threshold showing, they were not entitled to any relief thereafter.

> "Respondents obviously have not cleared both of these hurdles. While they indeed have established their initial *eligibility* for medical treatment, they have yet to make good on their claim that the particular medical treatment they received was reasonable and necessary. Consequently, they do not have a property interest." 526 U.S. 40, 61.

It is apparent upon the most cursory analysis of G&G's claim in this case that it is subject to the same infirmity as the claims asserted in *Sullivan*.

Assuming, *arguendo*, that a subcontractor that lacks privity of contract with an awarding body can nonetheless assert a claim based on the awarding body's contract with the prime contractor, the question that must be carefully addressed is whether, under either the public works contract or applicable state law, there is an entitlement to payment in full once the job is purportedly completed. Under the California prevailing wage law the right to payment in full is contingent not only on the existence of a contract between the parties, and the satisfactory completion of the ordinary specifications of the job, but also on compliance with the prevailing wage and certified payroll record keeping requirements.

G&G, as has been previously noted, never alleged the existence of any agreements between itself and the prime contractors, making it impossible to determine what, if any, property rights it possesses. Moreover, it has never made any kind of a showing at any level that it was in

compliance with the prevailing wage law. Finally, it has not alleged that it was due the funds withheld by the prime contractors because it had fully performed its part of the contract. It has never, in fact, even alleged any entitlement to these funds (Jt. App. 15, et seq., 62, et seq.). Clearly, under *Sullivan*, G&G has fallen far short of meeting its affirmative burden as the moving party in its own lawsuit. Its failure to "clear" these essential "hurdles" in its pleadings strongly suggests that in actuality G&G can establish no valid claim on the merits.

The action G&G filed in the District Court sought only declaratory and injunctive relief on constitutional grounds for the failure of DLSE to grant a hearing prior to the issuance of the notices to withhold. Significantly, G&G did not seek recovery of the funds withheld. While G&G alleged in that action that the notices to withhold were "wrongful" and "arbitrary and unreasonable" (Jt. App. 69),[7] *it has never alleged, and could never allege, either in the District Court or thereafter, that it was in compliance with the prevailing wage law requirements and had therefore met all of the conditions entitling it to payment in full.*[8] There is not even an allegation in the First Amended Complaint

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[7] It is well-settled that such conclusionary allegations are insufficient to defeat a motion to dismiss for failure to state a claim. *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996); *Anderson v. Clow*, 89 F.3d 1399, 1403 (9th Cir. 1996).

[8] As is argued more fully *infra*, § 1729 of the California Labor Code conditions the prime contractor's withholding from the subcontractor on "the subcontractor's failure to comply with the terms of this chapter," i.e., the prevailing wage law. Where the subcontractor pleads and proves compliance with this law, the state court must necessarily find in its favor.

that all contractual conditions precedent to receipt of the funds (i.e., full performance of the terms of the contract) were satisfied. (Jt. App. 69) Instead, G&G took the position that all it needed to do to state a claim for relief was to allege the withholding took place without an administrative hearing, and that this allegation would, in and of itself, establish a deprivation of due process, regardless of the validity of G&G's claims on the merits.

G&G's naked contention that it possesses a property interest and an entitlement to these withheld funds is clearly insufficient and cannot substitute for factual allegations to that effect. As this Court stated years ago in *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972) in considering the nature of property interests for purposes of due process:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have *a legitimate claim of entitlement to it.*" (Emphasis added.)

What is clearly missing in G&G's pleadings and proof is a showing that it has a property right to the funds in question based on the existence of a valid contract, in other words, "a legitimate claim of entitlement" to these funds. Without such threshold allegations and averments, G&G cannot be heard to argue that it is entitled to relief in either this Court, the Ninth Circuit, or the District Court.

Judges Hawkins and Reinhardt elected not to address this fundamental failing on G&G's part. They appear to have simply overlooked the fact that G&G, having failed

to set forth its entitlement to the funds by omitting allegations establishing the existence of a contract or contracts and allegations that it had performed all the terms of such contracts, had not stated a claim upon which any relief could be granted.

Judge Kozinki's learned dissent, on the other hand, points out that "G&G can have no property interest in being paid for work that has not been shown to satisfy the contractual conditions that it be completed in accordance with the prevailing wage requirements." 204 F.3d 946-947. (Pet. A-71).

G&G must be made, like any other litigant, to stand or fall on the sufficiency of its pleadings, pleadings in this instance that omitted essential allegations necessary to maintain its due process claims. As the Ninth Circuit has observed in comparable circumstances, "[a] complaint is not a puzzle, however, and we are loathe to allow plaintiffs to tax defendants, against whom they have leveled very serious charges, with the burden of solving puzzles in addition to the burden of formulating an answer to their complaint." *In re Glenfed, Inc. Securities Litigation*, 42 F.3d 1541, 1554 (9th Cir. 1994).

Having failed to sufficiently address, let alone prove at any stage of the administrative or judicial proceedings, its entitlement to the funds withheld by its prime contractor, G&G cannot be heard to argue at this juncture that it had a property right for due process purposes to a hearing in this case.

III

G&G'S CLAIM AGAINST THE STATE PURSUANT TO A CONSTRUCTION CONTRACT DOES NOT CONSTITUTE A PROPERTY RIGHT FOR DUE PROCESS PURPOSES

The Court below expressly determined that G&G's interest in being paid in full under its public works contract constituted a cognizable due process property right under the Fourteenth Amendment (136 F.3d 595-597). (Pet. A-63). As the carefully considered dissent of Judge Kozinski makes clear, the reductio ad absurdum of this novel reasoning is that every failure by the state to pay its bills on time will necessarily equate to a constitutional violation actionable in the federal courts.[9]

While this Court has not had occasion to make a conclusive determination with respect to the property rights of contractors performing public works for purposes of due process, virtually all the federal courts that have dealt with the question have reached a single conclusion. These courts have held unequivocally that the scope of due process rights does not extend to these kinds of cases. The overwhelming weight of these decisions lends support to Judge Kozinki's assessment of the

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[9] The expansion of property rights in due process cases has principally involved the interests of individuals and is relatively contemporary in origin. Thus a scholar writing twenty-five years ago observed that "due process protections have only comparatively recently been extended to protect advantageous relations with the government." Stewart, *The Reformation of American Administrative Law*, 88 Harvard Law Review 1667, 1717 (1975).

contrary decision by the majority in G&G as "very bad policy". 136 F.3d at 602. (Pet. A-81 to 82).

Thus the Second Circuit in *S & D Maintenance Co. v. Goldin*, 844 F.2d 962 (2nd Cir. 1988), *Martz v. Village of Valley Stream*, 22 F.3d 26 (2nd Cir. 1994), and *Christ Gatzonis Electrical Contractor, Inc. v. New York City School Construction Authority*, 23 F.3d 636 (2nd Cir. 1994) has consistently held that purported rights existing under ordinary construction and supply contracts do not equate to significant property interests protected by the Fourteenth Amendment.

In each of these Second Circuit cases, contractors filed actions under 42 U.S.C. § 1983 against public agencies that had withheld contract payments, asserting that the withholdings without hearings constituted a violation of due process. The Second Circuit held that the contractual relationship between a contractor and a public agency does not create a constitutionally protected interest in the payment of sums allegedly due pursuant to the contract. In a careful analysis that distinguishes between ordinary contract rights and property rights protected under the Due Process Clause, the Second Circuit reasoned:

> "An interest in enforcement of an ordinary commercial contract with a state is qualitatively different from the interests the Supreme Court has thus far viewed as "property" entitled to procedural due process protection. . . . [T]he Due Process Clause is invoked to protect something more than an ordinary contractual right. Rather, procedural protection is sought in connection with a state's revocation of a status, an estate

> within the public sphere characterized by a quality of either extreme dependence in the case of welfare benefits, or permanence in the case of tenure, or sometimes both, as frequently occurs in the case of social security benefits. . . . But we hesitate to extend the doctrine further to constitutionalize contractual interests that are not associated with any cognizable status of the claimant beyond its temporary role as a government contractor." *S & D Maintenance Co., supra,* 844 F.2d 966-67.

This pragmatic analysis, distinguishing ordinary contract rights from the sort of property right that is protected by due process, resonates in the decisions of other circuits as well. Justice Breyer, then on the First Circuit, wrote: "A mere breach of a contractual right is not a deprivation of property without constitutional due process of law. . . . Otherwise virtually every controversy involving an alleged breach of contract with a governmental institution or agency or instrumentality would be a constitutional case." *Bleeker v. Dukakis*, 665 F.2d 401, 403 (1st Cir. 1981). The Seventh Circuit, in affirming the dismissal of a § 1983 action brought by county employees asserting that the county violated their due process rights by its refusal to abide by a contract to permit time off in compensation for overtime hours worked, cautioned that "[t]here is reason to doubt whether the Fourteenth Amendment was intended to allow every person with a breach of contract claim against a state to bring that claim in federal Court", and that the Amendment was "not intended to shift the whole of the public law of the states into the federal courts." *Brown v. Brienen*, 722 F.2d 360, 364 (7th Cir. 1983).

The Third Circuit has likewise observed that "if every breach of contract by someone acting under color of state law constituted a deprivation of property for procedural due process purposes, the federal courts would be called upon to pass judgment on the procedural fairness of the processing of a myriad of contract claims against public entities," and that "the wholesale federalization of state public contract law seems far afield from the great purposes of the Due Process Clause." *Reich v. Beharry*, 883 F.2d 239, 242 (3rd Cir. 1989). Following this analysis, the Third Circuit upheld summary judgment against a building contractor asserting a property interest in its contract with a city housing authority, while at the same time permitting the contractor's claim for unpaid compensation for work allegedly performed under the contract to proceed under the state public contract law. *Linan-Faye Construction Co., Inc. v. Housing Authority of the City of Camden*, 49 F.3d 915 (3rd Cir. 1995). The court further held that whatever severe consequential damages the contractor may have suffered as a result of the housing authority's allegedly wrongful retention of the contractor's performance bond, that fact "cannot convert a contract claim into a deprivation of liberty." *Ibid.*, at 932.[10]

With its decision in *G&G*, the Ninth Circuit became the only circuit to find an enforceable property right under the Fourteenth Amendment in a garden variety

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[10] So pervasive has been this line of cases that the court in *Chavez v. Arte Publico Press*, 157 F.3d 282, 289 (5th Cir. 1998) was emboldened to state that its research "discloses no ordinary breach of contract case that has been allowed to proceed in federal courts against a state."

public works contract dispute between a public agency and a private contractor. Prior to *G&G*, the Ninth Circuit stood in the mainstream of federal law on this issue. In *San Bernardino Physicians' Services Medical Group, Inc. v. County of San Bernardino*, 825 F.2d 1404, 1408 (9th Cir. 1987), the court explained that "[e]ven though every contract may confer some legal rights under state law, that fact alone need not place all contracts within federal due process protection." In drawing the line between those government contracts that may create rights that are protected by the Fourteenth Amendment and those that do not, the court focused on the distinction between employment contracts and ordinary commercial contracts, such as contracts to perform a construction project or to supply the state with services or materials. "The right of an individual not to be deprived of employment that he or she has been guaranteed is more easily characterized as a civil right, meant to be protected by § 1983, than are many other contractual rights." *Ibid.*, at 1409. Consequently, "the farther the purely contractual claim is from an interest as central to the individual as employment, the more difficult it is to extend it constitutional protection without subsuming the entire state law of public contracts." Based on this analysis, the court held that a corporation's contract to supply medical services to a county hospital did not implicate any constitutionally protected interest, and that such a "contract to supply services to the state cannot sensibly be distinguished from construction contracts or even purely material supply contracts." *Ibid.*, at 410.

The *G&G* panel majority abandoned this reasoned and historic approach in favor of an unwarranted and

sweeping expansion of property rights and due process protections far beyond any contemplated in prior decisions of the federal courts. G&G's constitutional claim, according to the panel majority, "arises from its public works contract; it has a property interest in being paid in full for the construction work it has completed." (136 F.3d 595-597). (Pet. A-63).

The federal courts have uniformly held that there can be " 'no legitimate claim of entitlement' to funds allegedly due" pursuant to "a contract [that] vested" a public agency "with discretion to withhold interim payments." (*Christ Gatzonis Electrical Contractor, Inc., supra*, 23 F.3d at 640). In so ruling, these courts have relied on *Board of Regents v. Roth, supra*, 408 U.S. 564, 576-78, 92 S.Ct. 2701, 2708-09, 33 L.Ed. 2d 548 (1972). As this Court stated in that case, "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . . " 408 U.S. at 577.

Other decisions of this Court have followed the same reasoning. *See, e.g., Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 48 L.Ed. 2d 684 (1976); *Memphis Light, Gas, and Water Division v. Craft*, 436 U.S. 1, 11-12, 98 S.Ct. 1554, 56 L.Ed. 2d 52 (1978) ["The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause' "].

The California courts have also directly addressed the question of the property rights of contractors under the prevailing wage law in *O.G. Sansone Co. v. Department of Transportation*, 55 Cal. App. 3d 444, 127 Cal. Rptr. 799

(1976). The *Sansone* Court, relying in part on this Court's earlier determination in *Atkin v. Kansas*, 191 U.S. 207, 24 S.Ct. 124, 48 L.Ed. 148 (1903) stated:

> "Under the statutory scheme presently before us, in acting pursuant to Labor Code § 1727 the state did not take property belonging to plaintiffs; rather, it withheld sums pursuant to the terms of its contract with plaintiffs."

55 Cal. App. 3d at 456.

In *Lloyd v. Stewart & Nuss*, 327 F.2d 642, 645-646 (9th Cir. 1964), a bankruptcy case, the Ninth Circuit likewise held that a subcontractor under the California prevailing wage law has no property right in any sums withheld by the state.

It therefore appears that not only have the purported property rights asserted by G&G failed to attain "constitutional status by virtue of the fact that they have been initially recognized and protected by state law" (*Paul v. Davis*, 424 U.S. 693, 710, 96 S.Ct. 1155, 47 L.Ed. 2d 405), these so called "rights" have been specifically denied such status by all the California courts that have considered the question.

The Ninth Circuit *G&G* panel majority, however, looked beyond state law, and beyond the state's contracts, to the Constitution as an independent source of property rights. Ultimately unable to find any basis for G&G's asserted claim to a property interest in the provisions of the public works contracts or in state law in general, the panel majority relies on *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349 (1969) to conclude that although G&G has no right to

prompt payment (and no right to a deprivation hearing) under the state's statutory scheme (156 F.3d 901), any withholding under this scheme is constitutionally infirm. *Sniadach*, however, is inapposite. In a garnishment case, such as *Sniadach*, a creditor seeks to seize funds that are indisputably owed by a third party to the debtor. The funds being seized are the debtor's property. In contrast, in a public works contract case such as this, there is inevitably a substantive dispute between the immediate parties to the contract as to whether the contract requires payment of the amounts withheld. The awarding body promises to make the payment; but the contractor promises, *inter alia*, that prevailing wages will be paid and that certified payroll records will be kept and made available as conditions precedent to receiving payment. To say that the contractor is entitled to the withheld funds, and therefore that the state's failure to make payment has deprived the contractor of its "property" without due process of law, is to decide the merits of the *substantive* dispute – a dispute founded upon a breach of contract claim – between the contracting parties.[11]

If the Ninth Circuit's reasoning on this point is to stand as legal precedent, then, as previously mentioned, every failure by a state, county or municipality to pay its bills on time will arguably constitute an actual deprivation of due process. Under this misconceived theory an

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[11] G&G also finds itself in the dubious position of being one who has availed itself of the benefits of the very statute it attacks. *Arnett v. Kennedy*, 416 U.S. 134, 153, 94 S.Ct. 1663, 40 L.Ed. 2d 15 (1974); *Fahey v. Mallonee*, 332 U.S. 245, 255, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947).

alarming number of contractual sows' ears are to be converted to constitutional silk purses. As has been discussed, *supra*, the result, which a more circumspect Ninth Circuit earlier warned against in *San Bernardino Physician Services, supra*, and the Seventh Circuit warned against in *Brown v. Brienen, supra*, will be the inevitable shifting "of the whole of the public law of the state into the federal courts", courts which are already known to be overburdened with a demanding caseload. If the Ninth Circuit's approach is to be upheld, for the first time in their history, federal district judges will be required to routinely adjudicate local construction disputes, including but not limited to claims concerning the adequacy of plumbing, heating and air conditioning improvements and compliance or noncompliance with state and municipal building codes.

This Ninth Circuit's approach to property rights and due process goes well beyond any intent expressed by the framers of the Constitution, finds no support in logic, and is contrary to established precedent. Unless it is overturned, it threatens to upset the carefully preserved balance between the state and federal courts.

IV

A WIDE ARRAY OF STATE LAWS EXISTS TO REMEDY THE DAMAGE G&G CLAIMS TO HAVE SUSTAINED

The G&G panel majority held that a state court breach of contract action to recover the withheld funds does not provide adequate due process to a subcontractor in the position of G&G in this case; that the subcontractor

is in effect left with an "empty bag." (Pet. A-28). Other federal courts have reached the opposite conclusion, finding that state lawsuits provide a satisfactory vehicle for the vindication of the subcontractor's rights in these types of cases.

In *Brown v. Brienen, supra*, 722 F.2d 360, the Seventh Circuit held that even if a county's denial of time off for overtime worked by county employees could be said to implicate any property rights (a proposition the court found extremely doubtful), the availability of a post-deprivation state court action for breach of contract which could make the employees whole for any losses provided an adequate remedy that satisfied the requirements of due process. Likewise, in *Reich v. Beharry, supra*, 883 F.2d 239, 242-243, the Third Circuit, after expressing "considerable doubt" that a private attorney had an enforceable property interest in the payment of amounts allegedly due as a result of work he had performed under a contract with a county, held that the availability of a breach of contract remedy in state court through which he could be made whole for the unpaid fees provides "all the process that was constitutionally due."

A subcontractor involved in a public works project in California who has had funds withheld under the prevailing wage law may request an assignment of the prime contractor's rights to bring a lawsuit against the state under Labor Code §§ 1730-1733. The prime contractor in most cases is understandably motivated to agree to such an assignment because it will tend to eliminate a suit by

the subcontractor against the prime,[12] thereby sparing the latter the cost and travail of litigation. The assignment of the claim serves the interests of both prime contractor and subcontractor.

In the unlikely event there is no assignment, however, the subcontractor is still not foreclosed from asserting his right to the withheld funds. A well-developed body of case law in California invests the subcontractor with comprehensive remedies for breach of contract. This body of decisional law provides, *inter alia*, for suits for damages (*Coughlin v. Blair*, 41 Cal. 2d 587, 597, 262 P.2d 305 (1953)), recission (*Integrated, Inc. v. Fergusson Electrical Contractor*, 250 Cal. App. 2d 287, 297, 58 Cal. Rptr. 503 (1967) [Subcontractor on state public works project could rescind contract for nonpayment amounting to a material breach of contract and sue for reasonable value of services]), restitution on a theory of unjust enrichment (*Crofoot Lumber v. Thompson*, 163 Cal. App. 2d 324, 331, 329 P.2d 302 (1958)), specific performance, declaratory relief and injunctive relief (*Smith v. Mendonsa*, 108 Cal. App. 2d 540, 544, 238 P.2d 1039 (1952)).[13]

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[12] Indeed, a subcontractor operating under the California prevailing wage law could bargain for a provision in the subcontract automatically entitling him to an assignment in the event of a withholding from the prime contractor by an awarding body.

[13] The California Supreme Court long ago recognized that equitable remedies, such as those sought by G&G here, are as readily available under a public contract as under private contracts. "The cases recognize no distinction between public and private contracts with respect to the right of equitable relief. . . . The California cases refuse to apply special rules of law simply because a government body is a party to a contract." *M.F. Kemper Construction v. City of Los Angeles* (1951) 37 Cal. 2d 696, 704, 235 P.2d 1.

The Ninth Circuit had grave doubts about the efficacy of a state claim by a subcontractor against a prime contractor for breach of contract, erroneously concluding that the provisions of § 1729 of the Labor Code could constitute a complete defense to any breach of contract action under state law. (156 F.3d at 602).

This interpretation of § 1729, for which the court cited no authority or precedent, is based on a misconstruction of the language of that section. While that section does provide that it shall be "lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body," the right of withholding by the prime contractor is qualified and can only be justified "on account of the subcontractor's failure to comply" with the prevailing wage law. If the withholding is not "on account of a violation" of the prevailing wage law, this section by definition does not provide a defense. The trier of fact, finding no violation of the law, would surely further find that the subcontractor is entitled to recover the withheld funds. A fair reading of § 1729 can only lead to the conclusion that its exculpatory effect is limited to the situation where there is a demonstrable violation by the subcontractor.

The dissent by Judge Kozinski, noted a remedy in addition to the remedy of a common law suit for breach of contract, i.e., a subcontractor may sue for equitable subrogation and get a full hearing of its claims why the

funds should not be withheld. (Pet. A-50). There is nothing in either the record or the law to suggest that the relief thus granted would in any way be inferior to the relief mandated by the court. The DLSE has continued to take the position in this litigation that equitable subrogation permits the subcontractor to stand in the shoes of the prime contractor and obtain a full and fair hearing under §§ 1730-1733 of the California Labor Code. As the agency empowered to administer the prevailing wage law in California, its determinations in this respect have been accorded great weight in the California courts. *Henning v. Industrial Welfare Commission*, 46 Cal. 3d 1262, 1269, 252 Cal. Rptr. 278 (1988).

While it has not been widely applied in the public works area, the doctrine of equitable subrogation is "broad enough to include every instance in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter." *Caito v. United California Bank*, 20 Cal. 3d 694 704, 144 Cal. Rptr. 751 (1978).

In addition, over the years the California Legislature has created two distinct statutory vehicles for subcontractors on public works projects to use to prosecute their rights to withheld funds. Thus, the subcontractor is empowered to proceed to recover the withheld funds under both the stop notice procedures and the payment bond provisions of the California Civil Code.

The right of a subcontractor on a public works project to invoke the stop notice provisions of California Civil Code §§ 3110 and 3181 is clear, subcontractors having

been expressly included among those persons entitled to "serve a stop notice upon the public entity responsible for the public work. . . . " (Cal. Civ. Code § 3181). Upon receipt of a stop notice, Civil Code § 3186 requires the public entity to withhold from the original contractor "an amount sufficient to answer the [subcontractor's] claim." In effect, the filing imposes "a trust obligation on the public agency." The subcontractor may then file a lawsuit pursuant to § 3210 of the Civil Code and require the awarding body to pay it the money claimed.

In *United States Fidelity & Guaranty Co. v. Oak Grove Union School District*, 205 Cal. App. 2d 226, 230-231, 22 Cal. Rptr. 907, 910 (1962), the California Court of Appeal explained that the stop notice procedure exists "to provide protection to subcontractors against defaulting contractors." Thus, a subcontractor, such as G&G, has a defined statutory remedy under Civil Code § 3210, in addition to the aforementioned breach of contract theories of action against the prime contractor, to secure payment of amounts purportedly due under its subcontract by use of the stop notice procedure. G&G has never argued that this statutory remedy is insufficient to protect its rights.

The provisions of California Civil Code § 3248, which require prime contractors on public works projects to purchase a payment bond, arm subcontractors in California with an additional remedy should the prime contractor default on payment. (*Department of Industrial Relations v. Seaboard Surety Co.*, 50 Cal. App. 4th 1501, 1508, 58 Cal. Rptr. 2d 532 (1996).) Moreover, a subcontractor's action against the payment bond "may be maintained separately from" an action upon a stop notice claim. (Cal.

Civ. Code § 3250). *Contractors Labor Pool v. Westway Construction*, 53 Cal. App. 4th 152, 158-160, 61 Cal. Rptr. 2d 715 (1997). Thus in *Consolidated Electric Distributor, Inc. v. Kirkham, et al.*, 18 Cal. App. 3d 54, 61, 95 Cal. Rptr. 673, 677 (1971), the Court of Appeal recognized that the two forms of action are independent.

The adequacy of post-deprivation state court remedies is an issue that has come frequently before this Court over the years. This case presents this Court with an opportunity to revisit this issue in the context of an alleged deprivation of property founded upon a commercial contract with a state entity.[14]

In *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed. 2d 420, *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed. 2d 662 (1981), the Court recognized that "post-deprivation remedies made available by the State can satisfy the Due Process Clause." 451 U.S. at 538, 101 S.Ct. at 1914. The Court reasoned:

> "[E]ither the necessity of quick action by the State or the impracticality of providing any meaningful pre-deprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the

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[14] An academic commentator's detailed examination of this issue concluded that "[c]ontractual interests, though protected by the Constitution, receive adequate protection in state court post-deprivation proceedings." Kreynin, *Breach of Contract as Due Process Violation: Can the Constitution Be a Font of Contract Law?*, 90 Columbia Law Rev. 1098, 1122 (1990).

> State's action at some time after the initial taking, can satisfy the requirements of procedural due process." 451 U.S. at 539, 101 S.Ct. at 1915.

The Court held that although an action under § 1983 might provide more relief than a state tort action, the available state remedies "could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process." 451 U.S. at 544, 101 S.Ct. at 1917.

In *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed. 2d 393 (1984), like *Parratt*, the Court found the availability of a post-deprivation state tort action that could provide compensation for the loss constitutes sufficient due process with respect to prisoners' claims of wrongful destruction of property by prison officers. To be sure, part of the rationale behind these cases was that the alleged destruction of the property did not stem from the proper implementation of an established state procedure, but rather, from the unauthorized and unanticipated acts of state employees.

Even the fact that the challenged action is authorized by state law and is implemented in an anticipated way by state employees consistent with established methods does not necessarily mean that a state court post-deprivation remedy is inadequate. For example, in *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed. 2d 711 (1977), this Court held that state tort remedies provided adequate process for students subjected to corporal punishment in school. Having concluded that a pre-disciplinary administrative hearing was not required, the Court could have insisted on a post-disciplinary hearing. It did not, as a

post-disciplinary tort action could adequately compensate the student for the wrongful imposition of discipline.

In cases where this Court has sought to limit *Parratt* and *Hudson*, the available state court remedy plainly could not provide adequate compensation for the deprivation. Thus, in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-37, 101 S.Ct. 1148, 1157-58, 71 L.Ed. 2d 265 (1982), this Court, after observing that a post-deprivation tort remedy was not capable of making the plaintiff whole, held that the availability of such a remedy did not satisfy the requirements of due process. The deprivation consisted of a state administrative agency's wrongful failure to proceed on a claim that was filed, within the agency's jurisdiction, against an employer for having discharged the claimant in violation of the state's anti-discrimination laws. The Court noted that reinstatement was not an available remedy under a tort claim, and thus, even a successful lawsuit could not provide him with the relief that would have been available but for the state's deprivation of his right to proceed on his anti-discrimination claim.

Likewise, in *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed. 2d 100 (1990), a sharply divided Court held that allegations in a mental patient's complaint that employees of a state mental treatment facility admitted him to the facility as a voluntary patient without taking any steps to ascertain whether he was mentally competent to sign admission forms were sufficient to state a § 1983 claim, notwithstanding the availability of post-deprivation tort remedies. In ascertaining the adequacy of the state's post-deprivation tort remedies, the Court applied the familiar tripartite test set forth in *Mathews v.*

Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976), weighing the following factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Zinermon v. Burch, supra*, 494 U.S. at 127, 110 S.Ct. at 984.

Not surprisingly, applying this test to a situation where the deprivation consisted of an extremely lengthy stay in a mental institution, the Court concluded that the state's post-deprivation tort remedy was inadequate.

In contrast to the injuries in *Logan* and *Zinermon*, the routine nature of the deprivation allegedly suffered by G&G renders it wholly compensable through the aforementioned state post-deprivation remedies. These remedies provide all the process that is due to a contractor challenging the state's failure to make payments allegedly owed under a commercial contract. The view of the court below would result in an enormous burden to states, counties, cities, and all other public agencies that award contracts.

V

THE DEPRIVATION COMPLAINED OF WAS INDIRECT AND DID NOT CONSTITUTE A DENIAL OF DUE PROCESS

A companion issue to the issue of state versus private action is the question of whether G&G was foreclosed

from proceeding against petitioners because the action of the State in withholding funds from the prime contractor only impacted G&G indirectly.

The sole action taken by petitioners, i.e., the issuance of notices to withhold to the contracting public bodies based on G&G's noncompliance with the prevailing wage law, was taken solely against the prime contractors, who thereafter unilaterally chose to withhold monies due G&G for work performed under its subcontracts. While the law allows the prime contractor to deduct wages and penalties from the subcontractor, the decision is that of the prime contractor, not the state.

> "Over a century ago this Court recognized the principle that the due process provision . . . does not apply to the *indirect adverse effects* of governmental action. Thus, in the *Legal Tender Cases*, 12 Wall. 457, 551, the Court stated:
>
> > 'That provision has always been understood as referring only to a *direct* appropriation, and not to consequential injuries resulting from the exercise of legal power. It has never been supposed to have any bearing upon, or to inhibit laws that *indirectly* work harm and loss to individuals.' "

O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 788-789, 100 S.Ct. 2467, 65 L.Ed. 2d 506 (1980) (Emphasis added).

The Ninth Circuit refused to apply the principle of *O'Bannon* and its progeny in this case, seizing on the idea that G&G, as a subcontractor, was the "target of the state's action here" (Pet. A-67) and that, therefore, this case falls within an express exception noted in *O'Bannon*,

i.e., where action is taken by one party for the purpose of "punishing" another. It is submitted, however, that this is yet another misreading of the record on the part of the Ninth Circuit, there being absolutely no evidence to support the conclusion that it was ever the intent or the policy of the State in enforcing the prevailing wage law to target or punish G&G, or other subcontractors.

The ascribing of such a motive to petitioners is fanciful, unwarranted and unfounded, particularly in view of the fact that the California courts have uniformly found that the purpose of the prevailing wage law, far from being a punitive one, is to foster the public welfare.

> "The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absences of job security and employment benefits enjoyed by public employees."

Lusardi Construction Co. v. Aubry, 1 Cal. 4th 976, 987, 4 Cal. Rptr. 2d 847 (1992).

None of the three opinions of the Ninth Circuit in this case refer to any evidence that suggests that in enforcing its contract the state was acting for any purpose other than that set forth in *Lusardi*, because, as noted, no such evidence exists. Not even G&G has argued that the

state acted with the motive assigned by the court in issuing the notices to withhold. Since there was nothing from which the court below could have inferred that the state acted with a specific intent to impact G&G, it therefore had no factual basis upon which to draw such an inference.

The mere knowledge that an adverse impact on third parties is likely to follow from the enforcement of the law is clearly not enough to vitiate the reasoning in *O'Bannon*. Thus, the fact that the state had reason to know that the withholding from the prime contractor might impact G&G is no more significant than the fact that in *O'Bannon* the government had reason to know that the cessation of reimbursements to a medical facility would impact its patients; that the Department of Agriculture had reason to know that the closing of a store would impact the employees of the store [*Castaneda v. U.S. Department of Agriculture*, 807 F.2d 1478 (9th Cir. 1987)]; that the U.S. Department of Education had reason to know that revoking student aid to a college would impact the students [*Grove City College v. Bell*, 687 F.2d 684, 704 (3rd Cir. 1982)]; or that the U.S. Department of Energy had reason to know that its offering of free storage facilities for nuclear waste would impact those in the business of providing such facilities. [*Nuclear Transport & Storage v. United States*, 890 F.2d 1348 (6th Cir. 1989)]. Yet the injured third parties suing in these cases, all of whom had as strong a claim as G&G has here, were held to be only indirectly affected by the government's action and, therefore, could state no due process claim.

The State of California, like most other states, has decided to conduct its business in the same fashion as

every builder in the private sector by electing to contract and deal exclusively with the prime contractor. The decision of the Panel clearly flies in the face of the long judicially acknowledged right of a state to dictate the terms and conditions upon which public works will be performed by private contractors.

In *Atkin v. Kansas, supra,* 191 U.S. 207, the Supreme Court upheld challenged Kansas legislation providing for maximum hours of work and requiring minimum rates of pay on public works projects. The Court stated:

> "It cannot be deemed a part of the liberty of any contractor that *he* be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. *On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities.* No court has authority to review its actions in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern." 191 U.S. at 222-223 (emphasis added).

In *Perkins v. Luekens Steel Co.*, 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940), a steel producer attacked the Public Contracts Act, a statute setting forth standards for those who deal with the federal government. This Court upheld the law, pointing out that '[l]ike private individuals and businesses, the government enjoys the unrestricted power to produce its own supplies, *to determine*

those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." 310 U.S. at 127 (emphasis added).

Correctly viewed, the terms and conditions of the state's public works contracts merely empower it and its political subdivisions to do what every private proprietor in the marketplace does, deal on building projects with a single prime contractor who, in turn, has the direct responsibility for the companies and individuals it chooses to select as subcontractors on the project. This is a practice that has existed as long as there has been a building industry in this country. See, e.g., discussion in Haggerty, *Real Estate Construction Current Problems* (Practicing Law Institute, 1973), p. 47, et seq. Business efficiency dictates that the owner (in this case the State) be permitted to look to and deal exclusively with the prime contractor, the only party with which it is in privity of contract, and to say that it holds the prime contractor accountable for all failures or defects in performance, whether they in fact be due to the fault of the prime contractor or one of its subcontractors.

Here, the State is merely exercising its right as a proprietor. Consequently, far from punishing or targeting those with whom it does not contract, the State here is engaging in a legitimate business practice, sanctioned by custom and practice, of refusing to deal with anyone other than the prime contractor and insisting that the prime contractor be responsible for the performance under the contract of all other parties. The Ninth Circuit had no justification for supposing any other motive on the part of petitioners.

Being only indirectly impacted by the alleged deprivation of the State, G&G cannot be heard to complain that it was denied due process.

CONCLUSION

For the reasons stated above, the decision of the court below should be vacated with instructions to enter judgment in favor of petitioners.

Respectfully submitted,

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APPENDIX

BILL NUMBER: AB 1646 CHAPTERED
BILL TEXT

CHAPTER 954
FILED WITH SECRETARY OF STATE SEPTEMBER 30, 2000
APPROVED BY GOVERNOR SEPTEMBER 29, 2000
PASSED THE ASSEMBLY SEPTEMBER 1, 2000
PASSED THE SENATE AUGUST 30, 2000
AMENDED IN SENATE AUGUST 29, 2000
AMENDED IN SENATE AUGUST 25, 2000
AMENDED IN SENATE AUGUST 7, 2000
AMENDED IN SENATE AUGUST 30, 1999
AMENDED IN SENATE AUGUST 16, 1999
AMENDED IN SENATE JULY 1, 1999
AMENDED IN SENATE JUNE 24, 1999

INTRODUCED BY Assembly Member Steinberg

MARCH 4, 1999

An act to amend Sections 1723, 1726, 1727, and 1773.1 of, to add Sections 1741 and 1743 to, to add and repeal Sections 1742 and 1742.1 of, to repeal Sections 1730, 1731, 1732, 1733, and 1771.7 of, to repeal and amend Section 1775 of, and to repeal and add Section 1771.6 of, the Labor Code, relating to public works.

LEGISLATIVE COUNSEL'S DIGEST

AB 1646, Steinberg. Public works: payments.

(1) Existing law regulating public works contracts requires the awarding body of a public works contract to withhold and retain from payments to the contractor all wages and penalties that have been forfeited pursuant to

the contract or existing law. The awarding body is required to transfer all wages and penalties retained, to the Labor Commissioner for disbursement pursuant to specified provisions whenever a contractor fails to bring a suit against the awarding body for recovery of wages and penalties withheld within 90 days after the completion of the contract and formal acceptance of the job.

This bill would require the awarding body to report promptly any suspected violations of the laws regulating public works contracts to the Labor Commission and to retain all amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner.

(2) Existing law authorizes the contractor to bring suit for the limited purpose of recovery of the penalties or forfeitures withheld.

Existing law permits the Division of Labor Standards Enforcement to intervene in a contractor's suit for recovery of amounts withheld, provides for the deposit of wages for workers who cannot be located into the Industrial Relations Unpaid Wages Fund, and provides for the deposit of penalties into the General Fund. Existing law, until January 1, 2003, requires a contractor to withhold moneys due a subcontractor in an amount sufficient to pay the wages that are the subject of a claim filed with the Division of Labor Standards Enforcement, as directed by the division, if the body awarding the public works contract has not withheld sufficient moneys to pay the wage claims. Existing law requires the contractor to pay those moneys to the subcontractor after receipt of notification that the claim has been resolved, or to pay those

moneys to the awarding body, under specified circumstances.

This bill would repeal these provisions and instead would require the Labor Commissioner to issue a civil wage and penalty assessment to the contractor or subcontractor or both if the Labor Commissioner determines after investigation that there has been a violation of the laws regulating public works contracts. The bill would permit an affected contractor or subcontractor to obtain review of a civil wage and penalty assessment by transmitting a written request for a hearing to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment and would require an impartial hearing officer, until January 1, 2005, and then an administrative law judge appointed by the Director of Industrial Relations to commence a hearing within 90 days of receipt of the request. The bill would permit an affected contractor or subcontractor to obtain review of the decision of the director, until January 1, 2005, and then an administrative law judge by filing a petition for a writ of mandate to the superior court within 45 days after service of the decision. The bill would provide for liquidated damages in an amount equal to the amount of unpaid wages, as specified. The bill would also authorize informal settlement meetings.

The bill would provide that the contractor and subcontractor are jointly and severally liable for all amounts due pursuant to a final order or a judgment on that final order, but would require the Labor Commissioner to collect amounts due from the subcontractor before pursuing the claim against the contractor. The bill would require

that the wage claim be satisfied from the amounts collected prior to those amounts being applied to penalties and that the money be prorated among all workers if an insufficient amount is recovered to pay each worker in full. The bill would require wages for workers who cannot be located to be placed in the Industrial Relations Unpaid Wage Fund, a continuously appropriated fund, and penalties to be paid into the General Fund.

(3) Existing law requires any political subdivision that enforces the laws regulating public works contracts and any court collecting fines or penalties that result from enforcement actions by political subdivisions to deposit penalties or forfeitures withheld from any contract payment in the General Fund of the political subdivision. Existing law authorizes a contractor to appeal an enforcement action by a political subdivision to the Director of Industrial Relations.

The bill would repeal and recast this provision to apply to any awarding body that enforces the laws regulating public works contracts in accordance with specified provisions of existing law.

The bill would require such an awarding body to provide written notice of the withholding of contract payments to the contractor and subcontractor, as specified. The withholding of contract payments would be reviewable in the same manner as a civil penalty order of the Labor Commissioner.

(4) Existing law provides that per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel, and subsistence pay, apprenticeship or other training programs, and similar

purposes. Existing law requires the representative of any craft, classification, or type of worker needed to execute a public works contract entered into with the state to file with the Department of Industrial Relations, fully executed copies of the collective bargaining agreements for the particular craft, classification, or type of work involved for the purposes of determining the per diem wages.

This bill would specify the employer contributions, costs, and payments that employer payments may include and would provide that employer payments not required to be provided by state or federal law are a credit against the obligation to pay the general prevailing rate of wages. However, credits for employer payments would not reduce the obligation to pay the hourly straight time or overtime wages found to be prevailing. This bill would expand the requirement that copies of collective bargaining agreements be filed with the Department of Industrial Relations to apply to representatives of any craft, classification, or type of worker needed to execute a public works contract entered into with a public entity other than the state. The bill would revise the filing requirements to permit, if the collective bargaining agreement has not been formalized, the temporary filing of a typescript of the final draft accompanied by a statement under penalty of perjury as to its effective date. Because this bill would impose additional duties on local agency employers, expand the scope of the existing crime of perjury, and provide that a violation of these provisions is a misdemeanor, this bill would impose a state-mandated local program.

(5) This bill provides that it would become operative on July 1, 2001.

(6) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature declares that its intent in adopting this act is to provide contractors and subcontractors with a prompt administrative hearing in the event that the contractor or subcontractor is alleged by the Labor Commissioner or an awarding body to have violated Labor Code provisions governing the obligations of contractors and subcontractors on public works projects, and to provide that the exclusive method for review of the decision after the administrative hearing is by petition for writ of mandate under Section 1094.5 of the

Code of Civil Procedure. It is not the intent of this act to preclude remedies otherwise authorized by law to remedy violations of this chapter.

SEC. 2. Section 1723 of the Labor Code is amended to read:

1723. "Worker" includes laborer, worker, or mechanic.

SEC. 3. Section 1726 of the Labor Code is amended to read:

1726. The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of the execution of the contract, and shall promptly report any suspected violations to the Labor Commissioner.

If the awarding body determines as a result of its own investigation that there has been a violation of this chapter and withholds contract payments, the procedures in Section 1771.6 shall be followed.

SEC. 4. Section 1727 of the Labor Code is amended to read:

1727. (a) Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner under this chapter. The amounts required to satisfy a civil wage and penalty assessment shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

(b) If the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a subcontractor's violations, the contractor shall, upon the request of the Labor Commissioner, withhold sufficient money due the subcontractor under the contract to satisfy the assessment and transfer the money to the awarding body. These amounts shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

SEC. 5. Section 1730 of the Labor Code is repealed.

SEC. 6. Section 1731 of the Labor Code is repealed.

SEC. 7. Section 1732 of the Labor Code is repealed.

SEC. 8. Section 1733 of the Labor Code is repealed.

SEC. 9. Section 1741 is added to the Labor Code, to read:

1741. If the Labor Commissioner or his or her designee determines after an investigation that there has been a violation of this chapter, the Labor Commissioner shall with reasonable promptness issue a civil wage and penalty assessment to the contractor or subcontractor or both. The assessment shall be in writing and shall describe the nature of the violation and the amount of wages, penalties, and forfeitures due and shall include the basis for the assessment. The assessment shall be served not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever occurs last. However, if the assessment is served after the expiration

of this 180-day period, but before the expiration of an additional 180 days, and the awarding body has not yet made full payment to the contractor, the assessment is valid up to the amount of the funds retained. Service of the assessment shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor, subcontractor, and awarding body. The assessment shall advise the contractor and subcontractor of the procedure for obtaining review of the assessment. The Labor Commissioner shall, to the extent practicable, ascertain the identity of any bonding company issuing a bond that secures the payment of wages covered by the assessment and any surety on a bond, and shall serve a copy of the assessment by certified mail to the bonding company or surety at the same time service is made to the contractor, subcontractor, and awarding body. However, no bonding company or surety shall be relieved of its responsibilities because it failed to receive notice from the Labor Commissioner.

SEC. 10. Section 1742 is added to the Labor Code, to read:

1742. (a) An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment. If no hearing is requested within 60 days after service of the assessment, the assessment shall become final.

(b) Upon receipt of a timely request, a hearing shall be commenced within 90 days before the director, who shall appoint an impartial hearing officer possessing the

qualifications of an administrative law judge pursuant to subdivision (b) of Section 11502 of the Government Code. The appointed hearing officer shall be an employee of the department, but shall not be an employee of the Division of Labor Standards Enforcement. The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for a hearing. Any evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor.

The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect. The assessment shall be sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing.

Within 45 days of the conclusion of the hearing, the director shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the director shall consist of a notice of findings, findings, and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Labor Commissioner. Within 15 days of the issuance of the decision, the director may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

The director shall adopt regulations setting forth procedures for hearings under this subdivision.

(c) An affected contractor or subcontractor may obtain review of the decision of the director by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision. If no petition for writ of mandate is filed within 45 days after service of the decision, the order shall become final. If it is claimed in a petition for writ of mandate that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) A certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order.

(e) A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and shall be given the same preference allowed by law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section.

(f) An awarding body that has withheld funds in response to a civil wage and penalty assessment under this chapter shall, upon receipt of a certified copy of a final order that is no longer subject to judicial review,

promptly transmit the withheld funds, up to the amount of the certified order, to the Labor Commissioner.

(g) This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter or the decision of an awarding body to withhold contract payments pursuant to Section 1771.5.

(h) This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2005, deletes or extends that date.

SEC. 11. Section 1742 is added to the Labor Code, to read:

1742. (a) An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment. If no hearing is requested within 60 days after service of the assessment, the assessment shall become final.

(b)(1) Upon receipt of a timely request, a hearing shall be commenced within 90 days before an administrative law judge appointed by the Director of Industrial Relations. The appointed hearing judge shall be an employee of the department, but shall not be an employee of the Division of Labor Standards Enforcement. The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for a hearing. Any evidence

obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor.

(2) The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect. The assessment shall be sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing.

(3) Within 45 days of the conclusion of the hearing, the administrative law judge shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the administrative law judge shall consist of a notice of findings, findings, and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Labor Commissioner. Within 15 days of the issuance of the decision, the administrative law judge may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

(4) The Director of Industrial Relations shall adopt regulations setting forth procedures for hearings under this subdivision.

(c) An affected contractor or subcontractor may obtain review of the decision of the administrative law judge by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision. If no petition for writ of mandate is filed within 45 days after service of the decision, the order shall become final. If it is claimed in a petition for writ of

mandate that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) A certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order.

(e) A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and shall be given the same preference allowed by law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section.

(f) An awarding body that has withheld funds in response to a civil wage and penalty assessment under this chapter shall, upon receipt of a certified copy of a final order that is no longer subject to judicial review, promptly transmit the withheld funds, up to the amount of the certified order, to the Labor Commissioner.

(g) This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter or the decision of an awarding body to withhold contract payments pursuant to Section 1771.5.

(h) This section shall become operative on January 1, 2005.

SEC. 12. Section 1742.1 is added to the Labor Code, to read:

1742.1. (a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the assessment or notice to be in error, the director shall waive payment of the liquidated damages. Any liquidated damages collected shall be distributed to the employee along with the unpaid wages. Section 203.5 shall not apply to claims for prevailing wages under this chapter.

(b) The Labor Commissioner shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a civil wage and penalty assessment under Section 1741, afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his or her designee to attempt to settle a dispute regarding the assessment without the need for formal proceedings. The awarding body shall,

upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a notice of withholding under subdivision (a) of Section 1771.6, afford the contractor or subcontractor the opportunity to meet with the designee of the awarding body to attempt to settle a dispute regarding the notice without the need for formal proceedings. The settlement meeting may be held in person or by telephone and shall take place before the expiration of the 60-day period for seeking administrative review. No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, the settlement meeting is admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, the settlement meeting, other than a final settlement agreement, is admissible or subject to discovery in any administrative or civil proceeding. The assessment or notice shall advise the contractor or subcontractor of the opportunity to request a settlement meeting.

This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2005, deletes or extends that date.

SEC. 13. Section 1742.1 is added to the Labor Code, to read:

1742.1. (a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of

wages covered by the assessment or notice shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the administrative law judge that he or she had substantial grounds for believing the assessment or notice to be in error, the administrative law judge shall waive payment of the liquidated damages. Any liquidated damages collected shall be distributed to the employee along with the unpaid wages. Section 203.5 shall not apply to claims for prevailing wages under this chapter.

(b) The Labor Commissioner shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a civil wage and penalty assessment under Section 1741, afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his or her designee to attempt to settle a dispute regarding the assessment without the need for formal proceedings. The awarding body shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a notice of withholding under subdivision (a) of Section 1771.6, afford the contractor or subcontractor the opportunity to meet with the designee of the awarding body to attempt to settle a dispute regarding the notice without the need for formal proceedings. The settlement meeting may be held in person or by telephone and shall take

place before the expiration of the 60-day period for seeking administrative review. No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, the settlement meeting is admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, the settlement meeting, other than a final settlement agreement, is admissible or subject to discovery in any administrative or civil proceeding. The assessment or notice shall advise the contractor or subcontractor of the opportunity to request a settlement meeting.

This section shall become operative on January 1, 2005.

SEC. 14. Section 1743 is added to the Labor Code, to read:

1743. (a) The contractor and subcontractor shall be jointly and severally liable for all amounts due pursuant to a final order under this chapter or a judgment thereon. The Labor Commissioner shall first exhaust all reasonable remedies to collect the amount due from the subcontractor before pursuing the claim against the contractor.

(b) From the amount collected, the wage claim shall be satisfied prior to the amount being applied to penalties. If insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.

(c) Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund.

(d) A final order under this chapter or a judgment thereon shall be binding, with respect to the amount found to be due, on a bonding company issuing a bond that secures the payment of wages and a surety on a bond. The limitations period of any action on a payment bond shall be tolled pending a final order that is no longer subject to judicial review.

SEC. 15. Section 1771.6 of the Labor Code is repealed.

SEC. 16. Section 1771.6 is added to the Labor Code, to read:

1771.6. (a) Any awarding body that enforces this chapter in accordance with Section 1726 or 1771.5 shall provide notice of the withholding of contract payments to the contractor and subcontractor, if applicable. The notice shall be in writing and shall describe the nature of the violation and the amount of wages, penalties, and forfeitures withheld. Service of the notice shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor and subcontractor, if applicable. The notice shall advise the contractor and subcontractor, if applicable, of the procedure for obtaining review of the withholding of contract payments.

The awarding body shall also serve a copy of the notice by certified mail to any bonding company issuing a bond that secures the payment of wages covered by the notice and to any surety on a bond, if their identities are known to the awarding body.

(b) The withholding of contract payments in accordance with Section 1726 or 1771.5 shall be reviewable

under Section 1742 in the same manner as if the notice of the withholding was a civil penalty order of the Labor Commissioner under this chapter. If review is requested, the Labor Commissioner may intervene to represent the awarding body.

(c) Pending a final order, or the expiration of the time period for seeking review of the notice of the withholding, the awarding body shall not disburse any contract payments withheld.

(d) From the amount recovered, the wage claim shall be satisfied prior to the amount being applied to penalties. If insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.

(e) Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund of the awarding body that has enforced this chapter pursuant to Section 1771.5.

SEC. 17. Section 1771.7 of the Labor Code is repealed.

SEC. 18. Section 1773.1 of the Labor Code is amended to read:

1773.1. (a) Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel, subsistence, and apprenticeship or other training programs authorized by Section 3093, so long as the cost of training is reasonably related to the amount of the contributions, and similar purposes, when

the term "per diem wages" is used in this chapter or in any other statute applicable to public works.

(b) Employer payments include all of the following:

(1) The rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program.

(2) The rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program communicated in writing to the workers affected.

(3) Payments to the California Apprenticeship Council pursuant to Section 1777.5.

(c) Employer payments are a credit against the obligation to pay the general prevailing rate of per diem wages. However, no credit shall be granted for benefits required to be provided by other state or federal law. Credits for employer payments also shall not reduce the obligation to pay the hourly straight time or overtime wages found to be prevailing.

(d) The credit for employer payments shall be computed on an annualized basis where the employer seeks credit for employer payments that are higher for public works projects than for private construction performed by the same employer, except where one or more of the following occur:

(1) The employer has an enforceable obligation to make the higher rate of payments on future private construction performed by the employer.

(2) The higher rate of payments is required by a project labor agreement.

(3) The payments are made to the California Apprenticeship Council pursuant to Section 1777.5.

(4) The director determines that annualization would not serve the purposes of this chapter.

(e) For the purpose of determining those per diem wages for contracts, the representative of any craft, classification, or type of worker needed to execute contracts shall file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements for the particular craft, classification, or type of work involved. The collective bargaining agreements shall be filed after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids. If the collective bargaining agreement has not been formalized, a typescript of the final draft may be filed temporarily, accompanied by a statement under penalty of perjury as to its effective date.

Where a copy of the collective bargaining agreement has previously been filed, fully executed copies of all modifications and extensions of the agreement that affect per diem wages or holidays shall be filed.

The failure to comply with filing requirements of this subdivision shall not be grounds for setting aside a prevailing wage determination if the information taken into consideration is correct.

SEC. 19. Section 1775 of the Labor Code, as amended by Section 1 of Chapter 757 of the Statutes of 1997, is repealed.

SEC. 20. Section 1775 of the Labor Code, as added by Section 2 of Chapter 757 of the Statutes of 1997, is amended to read:

1775. (a) The contractor and any subcontractor under him or her shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or, except as provided in subdivision (b), by any subcontractor under him or her.

The amount of this penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

(1) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected upon being brought to the attention of the contractor or subcontractor.

(2) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion. The difference between the prevailing

wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor or subcontractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

(b) If a worker employed by a subcontractor on a public works project is not paid the general prevailing per diem wages by the subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

(1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.

(3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.

(4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

(c) The Division of Labor Standards Enforcement shall notify the contractor on a public works project within 15 days of the receipt by the Division of Labor Standards Enforcement of a complaint of the failure of a subcontractor on that public works project to pay workers the general prevailing rate of per diem wages.

SEC. 21. This act shall become operative on July 1, 2001.

SEC. 22. No reimbursement is required by this act pursuant to Section 6 of Article XIIIB of the California Constitution for certain costs that may be incurred by a local agency or school district because in that regard this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIIIB of the California Constitution.

However, notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains other costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2

of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

(8)

Supreme Court, U.S.
FILED
DEC 4 - 2000
CLERK

No. 00-152

In The

Supreme Court of the United States

ARTHUR S. LUJAN, et al.,

Petitioners,

vs.

G & G FIRE SPRINKLERS, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed July 26, 2000
Certiorari Granted October 10, 2000

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RELEVANT DOCKET ENTRIES

U.S. District Court
Central District of California (Western Div.)

7/21/95	1	COMPLAINT (Summons(es) issued) (referred to Discovery Brian Q. Robbins); demand for JT (yt) [Entry date 07/27/95]
	• • •	
8/23/95	4	NOTICE OF MOTION AND MOTION by defendant to dismiss; motion hearing set for 10:00 9/23/95 (dmjr) [Entry date 08/25/95]
	• • •	
9/7/95	9	1st AMENDED COMPLAINT [1-1] by plaintiff G & G Fire Sprinker; adding Div Labor Standards, Dept of Industrial; jury demand; summons issued (dmjr) [Entry date 09/11/95]
	• • •	
9/19/95	17	NOTICE OF WITHDRAWAL by defendant withdrawing motion to dismiss [4-1] (dmjr) [Entry date 09/22/95]
9/19/95	18	NOTICE OF MOTION AND MOTION by defendant Victoria Bradshaw to dismiss; motion hearing set for 10:00 11/6/95 (dmjr) [Entry date 09/22/95]
10/6/95	19	Opposition to dfts' by plaintiff G & G Fire Sprinkler to motion to dismiss [18-1] (es) [Entry date 10/11/95]
10/16/95	20	NOTICE OF MOTION AND MOTION by plaintiff for summary judgment, alt for summary adjudication; motion hearing

set for 10:00 11/6/95 (dmjr) [Entry date 10/18/95]

10/16/95 – LODGED stmt submitted by plaintiff (FWD TO CRD), (dmjr) [Entry date 10/18/95]

10/16/95 21 MEMORANDUM by plaintiff in support of motion for summary judgment [20-1], of motion for summary adjudication [20-2] (dmjr) [Entry date 10/18/95]

10/16/95 22 REQUEST by plaintiff for judicial ntc (dmjr) [Entry date 10/18/95]

10/16/95 23 EXHIBITS, (dmjr) [Entry date 10/18/95]

• • •

10/23/95 24 MEMORANDUM by defendant in opposition to motion for summary judgment [20-1], to motion for summary adjudication [20-2] (dmjr) [Entry date 10/26/95]

10/23/95 25 STATEMENT of genuine issues of material facts by defendant (dmjr) [Entry date 10/26/95]

10/23/95 26 DECLARATION of Thomas S Kerrigan by defendant re [20-1], re [20-2] (dmjr) [Entry date 10/26/95]

10/23/95 27 DECLARATION of Michael S Villeneuve by defendant re [20-1], re [20-2] (dmjr) [Entry date 10/26/95]

10/23/95 28 OBJECTIONS by defendant to decls in suppt of mot for S/J (dmjr) [Entry date 10/26/95]

10/30/95 30 REPLY to dfts' opposition by plaintiff G & G Fire Sprinkler to motion for summary

judgment [20-1] (es) [Entry date 11/06/95]

10/30/95 31 SUPPLEMENTAL by plaintiff G & G Fire Sprinker re declaration [16-1] of Stephen A. Seiderman in supprt of rply to dfts' opposition to mot for S/J. (es) [Entry date 11/06/95]

10/30/95 32 Memo of P/A in reply to opposition by defendant to motion to dismiss [18-1] (es) [Entry date 11/06/95]

11/6/95 36 MINUTES: Crt denies dfts mot to dism & grants pltfs mot for S/J. by Judge Manuel L. Real CR: L LeBlanc (dmjr) [Entry date 11/16/95]

11/7/95 33 ORDER by Judge Manuel L. Real granting motion for summary judgment [20-1] Jgm shall be entered as requested in pla's motion & enjoining dfts from applying or enforcing CA Labor Code agnst pla or on account of alleged violations by pla of CA prevailing wage laws. (ENT 11/9/95) mld cpys & ntc. (ra) [Entry date 11/09/95]

11/7/95 34 ORDER by Judge Manuel L. Real denying motion to dismiss [18-1] (ENT 11/9/95) mld cpys & ntc. (ra) [Entry date 11/09/95]

11/7/95 35 JUDGMENT AND ORDER: by Judge Manuel L. Real ord tht pla is awarded declaratory & inj relief against defendants Dept of industrial, Div Labor Standards, Rosa Frazier, Roger Miller, Daniel Dellarocca, Lloyd W Aubry Jr, Victoria Bradshaw. Dfts are enjoined from applying or enforcing CA Labor Code. Pla shall recover costs of suit terminating case

(ENT 11/9/95) MD JS-6 mld cpys & ntc. (ra) [Entry date 11/09/95]

11/7/95 – LODGED jgmt submitted by plaintiff (FWD TO CRD) (dmjr) [Entry date 11/14/95]

11/7/95 – LODGED/PROPOSED Order (FWD TO CRD) (dmjr) [Entry date 11/14/95]

11/7/95 – LODGED/PROPOSED Order (FWD TO CRD) (dmjr) [Entry date 11/14/95]

11/13/95 37 OBJECTIONS by defendant to [35-2], to [33-1] (dmjr) [Entry date 11/16/95]

11/13/95 38 MEMORANDUM by defendant in support of objection [37-1] (dmjr) [Entry date 11/16/95]

1/16/95 [sic] 39 NOTICE OF APPEAL by defendant Dept of Industrial, defendant Div Labor Standards, defendant Rosa Frazier, defendant Roger Miller, defendant Daniel Dellarocca, defendant Lloyd W Aubry Jr, defendant Victoria Bradshaw to 9th C/A from Dist. Court jgm & ord file 11/7/95. (cc: Thomas S. Kerrigan, Levin, Stein, Chyten & Schneider.) Fee: Paid (dl)

1/16/95 [sic] 40 Representation Statement appeal [39-1] (dl)

1/16/95 [sic] 41 EX PARTE APPLICATION by defendant for ord short ti to mot for stay & modification of inj pending appeal (dmjr) [Entry date 11/27/95]

1/16/95 [sic] – LODGED/PROPOSED Order (FWD TO CRD) (dmjr) [Entry date 11/27/95]

11/16/95 42 PROOF OF SERVICE by defendant of applic to short ti on (see srv list) on 11/15/95 by fax (dmjr) [Entry date 11/27/95]

11/16/95 43 OBJECTIONS by plaintiff to [41-1] (dmjr) [Entry date 11/27/95]

11/20/95 44 NOTICE OF MOTION AND MOTION by defendant to stay & modify inj pending appeal; motion hearing set for 10:00 12/18/95 (dmjr) [Entry date 11/27/95]

11/20/95 45 ORDER by Judge Manuel L. Real denying application [41-1] (dmjr) [Entry date 11/27/95]

11/20/95 46 RESPONSE by plaintiff to obj to ord granting mot for S/J & jgmt (dmjr) [Entry date 11/27/95]

* * *

12/7/95 54 NOTICE by defendants of issuance of stay of jgm (dh) [Entry date 12/13/95]

12/11/95 55 Opp by plaintiff G & G Fire Sprinkler to motion to stay & modify inj pending appeal [44-1] (dh) [Entry date 12/13/95]

12/11/95 56 Reply memo P&A by plaintiff G & G Fire Sprinkler in suppt of motion for attorney fees [48-1] (dh) [Entry date 12/13/95]

* * *

12/12/95 58 Amended Opp by plaintiff G & G Fire Sprinkler to motion to stay & modify inj

pending appeal [44-1] (dh) [Entry date 12/15/95]

12/13/95 57 Memo P&A in reply by defendant to opp to motion to stay & modify inj pending appeal [44-1] (dh) [Entry date 12/15/95]

12/18/95 59 MINUTES: granting motion for attorney fees [48-1], denying motion to stay & modify inj pending appeal [44-1] by Judge Manuel L. Real CR: L LeBlanc (dmjr) [Entry date 12/26/95]

12/21/95 60 OBJECTIONS by defendant to [59-1] (dmjr) [Entry date 01/02/96]

12/26/95 – LODGED cc 9th c/a ord: Applnts' mot to stay dist crt's declaratory & injunctive jgm ent on 11/9/95 is den. (pjap) [Entry date 01/19/96]

* * *

12/2/96 63 ORDER by Judge Manuel L. Real denying motion to stay & modify inj pending appeal [44-1]. (ENT 1-4-96) mldcpys/ntc. (ab) [Entry date 01/04/96]

12/16/96 – LODGED 9th c/a ord, mot for recons fld on 1/5/96 raises issues that warrant a response. Accordingly, appllee shll file & serve a response w/i 14 dys of dte of this ord. Dist crt's jgm ent on 11/9/95 is temp stayed pndng resolution of applnt's mot for recons. (fvap)

12/22/96 64 NOTICE by defendants of issuance of temp stay of jgm (pj) [Entry date 01/24/96]

12/30/96 65 NOTICE OF APPEAL by Victoria Bradshaw, Lloyd W. Aubry, Jr., Dnaiel

[sic] Dellarocca, Rober [sic] Miller, Rosa Frazier, Division of Labor Standards Inforcement, [sic] and Department of Industrial Relations to 9th C/A from Dist. Court ord ent on 1/4/96. (cc: Thomas Kerrigan: Levin, Stein, Chyten & Schneider). Fee: Paid. (app)

* * *

Ninth Circuit Court of Appeals

* * *

11/21/95 Filed Appellant Victoria Bradshaw, Lloyd W. Aubry emergency motion to stay injunction order pending this appeal (CIVATT) [95-56639] served on 11/21/95 [2901572] (Hard copies recvd on 11/22/95) (wp) [95-56639]

* * *

11/27/95 Filed faxed copy of aple's opposition to emergency mcn; memorandum of points and authorities; declaration; served on 11/27/95. (CIVATT) [2901572-1] [95-56639] (rc) [95-56639]

11/29/95 Filed order CIVATT (Stephen R. REINHARDT,): The district court's judgment entered on 11/9/95 is temporarily STAYED in order to permit the motions panel to review aplts' emergency motion to stay filed on 11/21/95. (PHONED OUT BY SH/CIVATT) [95-56639] (hh) [95-56639]

* * *

1/5/96 Filed Appellants' motion for reconsideration or order of 12/21/95, denying stay on appeal; declaration of Thomas S. Kerrigan; served on 1/5/96 (to CIVATT) [2926747] [95-56639] (hh) [95-56639]

1/5/96 Received Appellants' motion for enlargement of time to move for reconsideration of order denying stay on appeal; declaration of Thomas S. Kerrigan; served on 1/5/96 (not needed, motion for recon timely) [2926752] [95-56639] (hh) [95-56639]

1/10/96 Filed Appellants' notice of priority rehearing and/or submission date; served on 1/8/96 (to MOATT per promo) [2929378] [95-56639] (hh) [95-56639]

1/16/96 Filed order (Joseph T. SNEED, Michael D. HAWKINS,): The motion for reconsideration filed on 1/5/96 raises issues that warrant a response. See 9th Cir.R. 27-10. Accordingly, aple shall file and serve a response within 14 days of the date of this order. The dc's judgment entered on 11/9/95 is TEMPORARILY STAYED pending resolution of aplts' motion for reconsideration. (PHONED OUT 1:14) [95-56639] (hh) [95-56639]

1/30/96 Filed Appellee G & G Fire Sprinkler's opposition to defts' motion for reconsideration of order of 12/21/95; memorandum of points and authorities; declaration of Stephen A. Seideman; served on 1/29/96 (to MOATT) [95-56639] (hh) [95-56639]

2/1/96 Filed Appellants' (faxed) motion for leave to file reply to opposition to motion for reconsideration; declaration of Thomas S. Kerrigan; served on 2/1/96 (to MOATT) (ORIG. REC'D 2/2/96 [2942648] [95-56639] (hh) [95-56639]

2/2/96 Filed Appellee G & G Fire Sprinkler's opposition to aplts' motion for leave to file reply to opposition to motion for reconsideration; served on 2/1/96 (to MOATT) [95-56639] (hh) [95-56639]

2/8/96 Filed order MOATT (SH) Aplts' unopposed motion to expedite this appeal is GRANTED. Aplts' opening brief and excerpts of record are due 2/26/96; aple's brief is due 3/25/96; the optional reply brief is due within 14 days

after service of aple's brief. The clerk shall not grant an ext of time absent extraordinary and compelling circumstances. 9th Cir.R. 31-2:3. The clerk shall calendar this case for May, 1996. [95-56639] (hh) [95-56639]

* * *

2/13/96 Filed order MOATT (Joseph T. SNEED, Michael D. HAWKINS,): Aplts' motion for reconsideration is GRANTED. The dc's judgment entered on 11/9/95 is STAYED pending appeal. Aplt's "motion for leave to file reply to opposition to motion for reconsideration" is DENIED as moot. [95-56639] (hh) [95-56639]

2/26/96 Filed original and 15 copies Appellants' opening brief (Informal: n) 32 pages and five excerpts of record in 1 volume; served on 2/23/96 [95-56639] (hh) [95-56639]

2/27/96 Filed Aple G & G Fire Sprinkler's motion for reconsideration of court's order dated 2/13/96; served on 2/26/96 (to MOATT) [2958385] (hh) [95-56639]

* * *

3/7/96 Filed order MOATT (Joseph T. SNEED, Michael D. HAWKINS,): Aple's motion to reconsider this court's 2/13/96 order is DENIED. [95-56639] (hh) [95-56639]

3/11/96 CALENDARED: Pasadena May 7, 1996 9:00 a.m. Courtroom 1 [95-56639] (dd) [95-56639]

3/27/96 Filed original and 15 copies Appellee G & G Fire Sprinkler's brief, 40 pages, served on 3/25/96 (minor defcy: no stmt of rel cases) Notified counsel. [95-56639] record on appeal due 4/15/96; (hh) [95-56639]

* * *

4/9/96 Filed original and 15 copies appellant's reply brief, (Informal: n) 10 pages; served on 4/8/96 [95-56639] (hh) [95-56639]

* * *

5/7/96 ARGUED AND SUBMITTED TO Stephen R. REINHARDT, Alex KOZINSKI, Michael D. HAWKINS [95-56639] (jhc) [95-56639]

5/10/96 Received aple G & G Fire Sprinkler's letter dated 5/6/96 re: additional citations. (to PANEL) [95-56639] (hh) [95-56639]

8/27/97 Filed order (Stephen R. REINHARDT, Alex KOZINSKI, Michael D. HAWKINS,): Appeal no. 96-55194 is consolidated with appeal no. 95-56639 for purposes of disposition. Appeal no. 96-55194 is submitted on the briefs as of the filed date of this order. (parties phoned) [96-55194] (em) [96-55194]

* * *

2/3/98 FILED OPINION: AFFIRMED IN PART, REVERSED AND REMNDED IN PART. Costs to Appellee G & G Fire Sprinklers, Inc. (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published, Stephen R. REINHARDT; Alex KOZINSKI, dissenting; Michael D. HAWKINS, author.) FILED AND ENTERED JUDGMENT. [95-56639] (em) [95-56639]

2/17/98 [3395835] Filed original and 40 copies defts-aplts' petition for rehearing with suggestion for rehearing en banc 13 p.pages, served on 2/13/98 PANEL AND ACTIVE JUDGDES [sic] [95-56639] (em) [95-56639]

* * *

2/18/98 Filed State Building and Construction Trades Council of California et al 's motion to become amicus curiae ; served on 2/17/98 [3396705] PANEL (w/ copies of Petition for Rehearing en banc) [95-56639, 96-55194] (em) [95-56639 96-55194]

2/18/98 [3396726] Received original and 40 copies Amicus State Building brief in support of petition for rehearing with suggestion for rehearing en banc; (Motion pending); served 2/17/98 COPIES TO PANEL ONLY. (em) [95-56639 96-55194]

* * *

4/1/98 Filed order (Stephen R. REINHARDT, Alex KOZINSKI, Michael D. HAWKINS,): The motion of State Building and Construction Trade of California, etc. for leave to file brief Amici Curiae in support of Petition for Rehearing and Suggestion for Rehearing en banc is granted. The brief received by this court on 2/18/98 is ordered filed. The panel grants rehearing. Rehearing is scheduled for 6/16/98 at 11:00 am in Pasadena, California. [95-56639] (em) [95-56639]

* * *

4/14/98 Filed Amicus State Building in 95-56639's motion for leave to participate in oral argument (95-56639, 95-55194] served on 4/8/98 [3432275] FAXED PANEL (em) [95-56639 95-55194]

4/21/98 Filed order (Stephen R. REINHARDT, Alex KOZINSKI, Michael D. HAWKINS,): The motion of Amici Curiae The State Building

and Construction Trades Council of California AFL-CIO etc. for leave to participate in oral argument is granted. Aple and aplts shall each have 20 minutes to present their arguments, and amici shall have 10 minutes. (phoned out) [95-56639] (em) [95-56639]

* * *

5/6/98 Received orig. 06 copies G & G Fire Sprinker in 95-56639's brief in opposition of petition for rehearing and brief of amicus curiae; of 30 pages; with one-volume appendix to aple's brief; served on 5/5/98 deficient: motion pending (FEDEX TO PANEL) [95-56639] (em) [95-56639]

* * *

5/28/98 Filed original and 4 copies appellee G & G Fire Sprinkler in 95-56639's 30 pages brief in opposition to petition for rehearing and brief of amicus; with one volume of appendix; served on 5/5/98 (PANEL ALREADY SERVED) [95-56639] (em) [95-56639]

5/16/98 ARGUED AND SUBMITTED TO Stephen R. REINHARDT, Alex KOZINSKI, Michael D. HAWKINS [95-56639] (rmw) [95-56639]

9/10/98 Filed order and amended opinion. The opinion filed on 2/3/98 is amended as follows: (SEE CASE FILE) . . . AFFIRMED IN PART, REVERSED AND REMANDED IN PART. Costs to Aple G & G Fire Sprinkers. (Judges Stephen R. REINHARDT, Alex KOZINSKI dissenting, Michael D. HAWKINS, aut.) (Orig. opinion id: [3387125-1] [95-56639, 95-55194] (em) [95-56639 96-55194]

* * *

9/25/98 [3533632] Filed original and 40 copies deft-aplts in 95-56639 petition for rehearing with suggestion for rehearing en banc 15 p.pages, served on 9/24/98 PANEL AND ACTIVE JUDGES [95-56639] (em) [95-56639]

10/28/98 Filed order (Stephen R. REINHARDT, Alex KOZINSKI, Michael D. HAWKINS,): The petition for rehearing is denied and the suggestion for rehearing en banc is rejected. [95-56639] (em) [95-56639]

11/5/98 MANDATE ISSUED/COSTS TAXED [95-56639, 96-55194] (jjf) [95-56639 96-55194]

2/1/99 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 98-1204 filed on 1/29/99. [95-56639] (em) [95-56639]

4/22/99 Received notice from Supreme Court, petition for certiorari GRANTED on 4/19/99. Supreme Court No. 98-1204 (See also next entry;) FAXED PANEL (em) [95-56639, 96-55194]

4/22/99 Received copy of Supreme Court opinion dated 4/19/99 re: judgment vacated and remanded to USCA (Note: notice of granting of cert and judgment were in a letter dtd 4/19/99 from U.S. Supreme Court) FAXED PANEL [95-56639, 96-55194]

5/24/99 Filed Supreme Court judgment; filed and entered in the Supreme Court on 4/19/99: vacated with costs (Bradshaw to recover $300 costs from G & G Sprinklers) and remanded to USCA. (PANEL) [95-56639, 95-55194] (em) [95-55639 96-55194]

5/25/99 Filed order (Stephen R. REINHARDT, Alex KOZINSKI, Michael D. HAWKINS,): Within 21 days of filed date of this order, the parties shall file simultaneous letter briefs, not to exceed ten (10) pages, explaining why, in light of the Supreme Court's decision in American Mfrs. Mutt. Ins. Co. v. Sullivan US ___ 119 S. Ct. 977 (3/3/99), and its remand order to this court, this matter should or should not be remanded to the USDC with instructions to dismiss pltf's complaint with prejudice, (phoned out) [95-56639, 96-55194] (em) [95-56639 96-55194]

* * *

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as	CIVIL NO. 95-4839 COMPLAINT FOR: 1. DECLARATORY RELIEF (UNCONSTITUTIONAL APPLICATION OF STATE LAWS) 42 U.S.C. §1983, 28 U.S.C. §2201 2. DECLARATORY RELIEF (FACIAL UNCONSTITUTIONALITY OF STATE LAWS) 3. INJUNCTION 42 U.S.C. §1983 28 U.S.C. §2202 AND DEMAND FOR TRIAL BY JURY

Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; and Does 1 through 20, Defendants.	(Filed Jul. 21, 1995)

Plaintiff, G & G FIRE SPRINKLERS, INC., ("Plaintiff") alleges:

FIRST CLAIM FOR RELIEF

(Declaratory Relief)

1. Jurisdiction of this action is conferred on this United States District Court by the provisions of 42 U.S.C. §1983, 28 U.S.C. §1343(a)(4), and 28 U.S.C. §2201-2202 inasmuch as this action is to redress a deprivation of civil and constitutional rights guaranteed by the Fourteenth Amendment to the United States Constitution by persons acting under color of state law, to secure a declaration of rights to an actual controversy concerning the unconstitutional application of certain California Labor Code provisions to Plaintiff by Defendants, and Plaintiff's assertions concerning the facial unconstitutionality of those provisions, and to restrain and enjoin Defendants from enforcing the unconstitutional provisions in the future.

2. Venue of this action is proper in this Court under the provisions of 28 U.S.C. §1391(b) inasmuch as Defendants, or some of them, are either residents of or maintain

official offices and places of business within the judicial district of this Court, the United States District Court, Central District of California. Further, Plaintiff conducts business within the county of Los Angeles, California, within this judicial district, and Defendants' conduct alleged herein has affected Plaintiff at its offices and its construction projects located within the judicial district of this Court.

3. Plaintiff is now, and at all times herein mentioned has been, a corporation organized and existing under and by virtue of the laws of the State of California, which does business in, among other places, Los Angeles, California, County of Los Angeles, and with its principal place of business in Culver City, County of Los Angeles, California. Plaintiff is now, and at all times herein mentioned has been, engaged in business as a fire protection contractor duly licensed under the laws of the State of California.

4. (a) Defendant VICTORIA BRADSHAW ("BRADSHAW") is, and at all times herein mentioned has been, Chief of the Division of Labor Standards Enforcement ("DLSE"), (also known as the Labor Commissioner) Department of Industrial Relations, State of California, and, as such, is the public officer of the State of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws (*California Labor Code* §§ 1720-1815).

(b) Defendant BRADSHAW is sued herein in her official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. §1983.

5. (a) Defendant LLOYD W. AUBRY, JR. ("AUBRY") is, and at all times herein mentioned has been, Director of the Department of Industrial Relations, State of California, and as such is the public executive officer of the State of California responsible for the overall interpretation and enforcement of the State of California's wage and hour laws, including the "prevailing wage and apprenticeship" laws.

(b) Defendant AUBRY is sued herein in his official capacity, and is a "person" amenable to suit within the meaning of U.S.C. §1983.

6. (a) Defendant DANIEL DELLAROCCA ("DELLAROCCA") is, and at all times herein mentioned has been, a Deputy Labor Commissioner of the Division of Labor Standards Enforcement (hereinafter "DLSE"), Department of Industrial Relations, State of California, a public officer of the State of California, and, as such, is one of the public officers of the State of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws.

(b) Defendant DELLAROCCA is sued herein in his official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. §1983.

7. (a) Defendant ROGER MILLER ("MILLER") is, and at all times herein mentioned has been, a regional manager and/or Senior Deputy Labor Commissioner of the Division of Labor Standards Enforcement ("DLSE"), Department of Industrial Relations, State of California, a public officer of the State of California, and, as such, is

one of the public officers of the State of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws.

(b) Defendant MILLER is sued herein in his official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. §1983.

8. (a) Defendant ROSA FRAZIER ("FRAZIER") is, and at all times herein mentioned has been, a regional manager and/or Senior Deputy Labor Commissioner of the Division of Labor Standards Enforcement ("DLSE"), Department of Industrial Relations, State of California, a public officer of the State of California, and, as such, is one of the public officers of the State of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws.

(b) Defendant FRAZIER is sued herein in her official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. §1983.

9. Defendants MILLER, FRAZIER, BRADSHAW and AUBRY, and each of them, maintain offices and do business throughout the State of California, and maintain offices and do business in Los Angeles, County of Los Angeles, State of California.

10. Plaintiff is ignorant of the true names and capacities of the defendants sued herein as Does 1 through 20, inclusive, and therefore sues the defendants by such fictitious names.

11. Plaintiff has performed work both as a subcontractor and prime contractor on various public works

projects which are subject to the prevailing wage requirements set forth in the California Labor Code.

12. Plaintiff intends to continue performing work on public works projects in California as a subcontractor and prime contractor.

13. Defendants, acting under color of California Labor Code §§ 1727-1731, 1774, 1775, 1777.5 and 1815, issued Notices of Wages owed, Notices of Penalty Assessments, and Notices to Withhold (hereinafter referred to collectively as the "Notices"), to awarding bodies of the prime contracts on public works projects on account of the alleged failure of Plaintiff to pay prevailing wages, including fringe benefits and apprenticeship-training fees, and, to have otherwise complied with the prevailing wage and apprenticeship laws.

14. Prior to issuing the Notices to Withhold mentioned in Paragraph 13, above, Defendants did not provide Plaintiff, or the Prime Contractors who employed Plaintiff with any hearing with respect to the allegations or potential forfeitures or penalties, or with respect to the reasons for them, or with respect to the total of the alleged amounts due.

15. The amount presently withheld as a result of such notices is more than $100,000.

16. The awarding bodies continue to withhold not less than $100,000 from the Prime Contractors who employed Plaintiff, on account of the Notices.

17. None of Defendants have provided, or offered to provide, Plaintiff or any of the Prime Contractors

either a pre-deprivation or post-deprivation hearing on the claims involved.

18. California Labor Code §1729 provides:

> "1729. It shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the subcontractor's failure to comply with the terms of this chapter, and if payment has already been made to the subcontractor the contractor may recover from him the amount of the penalty or forfeiture in a suit at law."

The Prime Contractors for the Projects have withheld from Plaintiff not less than $100,000 due to the withholding from said Prime Contractors of monies due to the Notices.

19. Defendants stated to Plaintiff that there is no right to a pre-deprivation hearing. Defendants stated to Plaintiff that Labor Code §1732 provides that a lawsuit by the contractor or his assignee pursuant to Labor Code §1731 et seq. is the exclusive remedy of the contractor or his assignee with regard to wages and/or penalties withheld. Plaintiff has been deprived of the sum of not less than $100,000 in earned progress payments due it under its contracts for the Projects.

20. There was no hearing held prior to the issuance of any of the Notices. There is no procedure for a prompt post-withholding hearing with regard to such notices to withhold. There is no requirement that Defendants ever carry any burden to justify the issuance of a notice to withhold. There is no procedure to protect against the

issuance of notices to withhold in an excessive amount, resulting in withholding of excessive amounts of money.

21. The issuances of the notices to withhold by DLSE are not necessary to the implementation or enforcement of the prevailing wage laws. There are no emergency circumstances which necessitate the issuance of notices to withhold without a hearing and/or other reasonable and appropriate procedures.

22. The notices to withhold issued by the DLSE on account of alleged violations by Plaintiff at the above mentioned projects are wrongful, incorrect, and excessive, and were issued arbitrarily and unreasonably.

23. The issuance of the notices to withhold caused Plaintiff to be deprived of property in the form of substantial sums of money as the statutory provisions purported to be enforced by DLSE provide that upon the withholding of money from a prime contract by an awarding body, the contractor may withhold said money from the subcontractor. Thus, the notices to withhold issued by the DLSE were intended to, and did, cause Plaintiff to suffer a deprivation of property.

24. By the acts and conduct set forth above, Defendants have deprived Plaintiff of its property without due process of law in contravention of Section 1 of the Fourteenth Amendment to the U.S. Constitution.

25. There is now existing between Plaintiff on the one hand, and Defendants, and each of them, on the other hand, an actual, justiciable controversy with respect to which Plaintiff is entitled to have a declaration of its

rights and equitable relief, because of the facts, conditions, and circumstances set forth above.

26. (a) Plaintiff is entitled to a declaration of its rights declaring the acts of Defendants, and each of them, have been and are invalid, illegal, and in deprivation of Plaintiff's due process and property rights guaranteed by the Section 1 of the Fourteenth Amendment to the Constitution of the United Sates, [sic] that the Notices are invalid and of no legal effect.

(b) Plaintiff has been required to employ attorneys to vindicate its belief that the provisions of the California Labor Code set forth herein are unconstitutional on their face and as applied, and to prosecute this action, and is entitled to an award of attorney's fees pursuant to the provisions of 42 U.S.C. §1988.

SECOND CLAIM FOR RELIEF

(Declaratory Relief)

(Facial Unconstitutionality of State Laws)

27. Plaintiff realleges and incorporates by this reference herein each and every allegation contained in paragraphs 1 through 26 of the First Claim for Relief as though fully set forth herein.

28. (a) Insofar as is relevant herein, *California Labor Code* §§1727, 1730, 1732, 1733, and 1775, provide:

§1727. Withholding of Forfeited Sums

"Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all wages and penalties which have been

forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Standards Enforcement or by the awarding body. (1937 ch. 90, 1431, 1992 ch. 1342)"

§1730. Transfer of Wages and Penalties to Labor Commissioner

"Every awarding body shall transfer all wages and penalties that have been withheld pursuant to Section 1727 to the Labor Commissioner, for disbursement pursuant to Section 1775, whenever a contractor fails to bring a suit against the awarding body for recovery of wages and penalties that are withheld pursuant to Section 1727 within 90 days after the completion of the contract and formal acceptance of the job. (1992 ch. 1342)"

§1733. Recovery of Wages and Penalties – Suit

"Suit may be brought by the contractor or his or her assignee without permission from the state or other authority and is limited to the recovery of the wages and penalties without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract. No other issues shall be presented to the court in the case and the burden shall be on the contractor or his or her assignee to establish his or her right to the wages or penalties withheld. The Division of Labor Standards Enforcement may intervene in any court proceeding brought pursuant to this

section. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on motion of the awarding body or the Division of Labor Standards Enforcement. The Division of Labor Standards Enforcement may, upon written request of any awarding body, assist in the defense of the action. (1937 ch. 90, 1957 ch. 398, 1988 ch. 160, 1992 ch. 1342)"

§1775. Payment Less Than Stipulated, Rate – Penalty

"The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract, by him or her or by any subcontractor under him or her. The amount of this penalty shall be detemined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part."

(b) On their face, Sections 1727, 1729, 1730, 1732, 1733 and 1775, deny and deprive persons of their property without due process of law in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, inasmuch as said Sections authorize the deprivation of property without notice or hearing, and provide for the imposition of penalties and forfeitures without notice or hearing.

(c) Defendants presently maintain a policy and practice pursuant to *California Labor Code* §§1720-1815 which authorizes the withholding of monies from Contractors and Subcontractors who perform services on Public Works Projects, as well as the imposition of penalties and forfeitures, without providing such Contractors and Subcontractors any prior notice or prior hearing for alleged violations of said Sections.

(d) Plaintiff has been required to employ attorneys to vindicate its belief that the provisions of the California Labor Code set forth herein are unconstitutional on their face and as applied, and is entitled to an award of attorney's fees pursuant to the provisions of 42 U.S.C. §1988.

THIRD CLAIM FOR RELIEF

(Injunction)

29. Plaintiff realleges and incorporates by this reference herein each and every allegation contained in paragraphs 1 through 28 above as though fully set forth herein.

30. The actions and conduct of Defendants have caused Plaintiff to suffer great and irreparable injury and unless the Court issues relief by way of a Temporary Restraining Order, Preliminary and Permanent Injunction, Plaintiff and other contractors will suffer great and irreparable injury in that Plaintiff and other contractors will (1) be deprived of its property without due process of law; (2) be liable for civil penalties and back wage forfeitures; (3) be required to expend time and money; and (4) be exposed to unfavorable publicity which will injure its reputation as a reputable construction firm resulting in loss of business.

31. Plaintiff does not have an adequate remedy at law because (1) the pecuniary damages which it might suffer are presently difficult or impossible to fully ascertain; and (2) the irreparable injury to Plaintiff's reputation cannot be fully compensated by money damages. Further, since the provisions of the California Labor Code set forth herein are unconstitutional on their face, as well as in application to Plaintiff, Defendants' conduct in continuing to maintain and enforce such unconstitutional provisions entitles Plaintiff to injunctive relief to enjoin such provisions.

32. Plaintiff has been required to employ attorneys to vindicate its belief that the provisions of the California Labor Code set forth herein are unconstitutional on their face and as applied, and is entitled to an award of attorneys' fees pursuant to the provisions of 42 U.S.C. §1988.

PRAYER

WHEREFORE, Plaintiff prays for judgment as follows:

1. **ON ITS FIRST CLAIM FOR RELIEF:**

   a. For a Declaration Of Rights in Plaintiff's favor that as applied to Plaintiff, *California Labor Code* §§1720-1815 are unconstitutional as a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that the Notices are invalid and of no legal effect;

   b. For Costs of suit;

   c. For Attorneys' Fees pursuant to Section 42 U.S.C. 1988;

   d. For such other relief as is just and proper.

2. **ON ITS SECOND CLAIM FOR RELIEF:**

   a. For a Declaration Of Rights in Plaintiff's favor that on their face, *California Labor Code* §§1727, 1729, 1730, 1732, 1733 and 1775 are unconstitutional as a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States;

   b. For Costs of Suit;

   c. For Attorneys' Fees pursuant to Section 42 U.S.C. 1988;

   d. For such other relief as is just and proper.

3. **ON ITS THIRD CLAIM FOR RELIEF:**

   a. For a Temporary Restraining Order, Preliminary and Permanent Injunction enjoining Defendants, and each of them, and their agents, employees, attorneys, representatives, as well as all those persons acting in active concert or participation with

them, including representatives of the awarding bodies from enforcing, or threatening to enforce, the provisions of *California Labor Code* §§1727, 1729 or 1775 against Plaintiff, or any other person, with regard to any "public works" project, including, without limitation, imposing, or threatening to impose, civil penalties against any person, including Plaintiff; issuing Notices to Withhold with regard to Plaintiff and/or any other person;

b. For Costs of Suit;

c. For Attorneys' Fees pursuant to Section 42 U.S.C. 1988;

d. For such other relief as is just and proper.

DATED: July 21, 1995

LEVIN, STEIN, CHYTEN
& SCHNEIDER

By: /s/ Steven A. Seideman
Steven A. Seideman, Esq.
Attorneys for Plaintiff
G & G FIRE SPRINKLERS, INC.

DEMAND FOR TRIAL BY JURY

Plaintiff hereby demands trial by jury.

DATED: July 21, 1995

LEVIN, STEIN, CHYTEN
& SCHNEIDER

By: /s/ Steven A. Seideman
Steven A. Seideman, Esq.
Attorneys for Plaintiff
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; ROGER MILLER, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; and DOES 1 through 20, Defendants/Appellants.	CASE NO. 94-8542-ER NOTICE OF MOTION AND MOTION TO DISMISS [F.R.C.P. Rule 12] Date: September 25, 1995 Time: 10 a.m. Courtroom: No. 1 (Filed Aug. 16, 1995)

TO THE ABOVE-NAMED PLAINTIFF AND TO ITS ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on September 25, 1995, at 10 a.m., or as soon thereafter as the matter can be heard, in Courtroom No. 1 of the HONORABLE EDWARD RAFEEDI, District Court Judge, located at 312 N. Spring Street, Los Angeles, California, defendants will move the Court for an order dismissing this case pursuant to Rule 12 of the Federal Rules of Civil Procedure.

The motion will be made on the grounds that the Complaint fails to state a claim upon which any relief can be granted and that Plaintiff has no standing to assert the challenges contained in its complaint.

The motion will be based on this Notice of Motion, the accompanying memorandum of points and authorities, and the pleadings, files and records in this action.

DATED: August 16, 1995

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California

By: /s/ Thomas S. Kerrigan
THOMAS S. KERRIGAN
Attorney for State Defendants

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; ROGER MILLER, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; and DOES 1 through 20, Defendant/Appellant.	CASE NO. 94-8542-R MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS Date: September 25, 1995 Time: 10 a.m. Courtroom: No. 1

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; and Does 1 through 20, Defendant/Appellant	CASE NO. 94-8542-R MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS Date: September 25, 1995 Time: 10 a.m. Courtroom: No. 1

I. INTRODUCTION

A. Factual Background

Plaintiff G&G Fire Sprinklers, Inc. (hereinafter "G&G"), performed work as a subcontractor on certain State of California public work projects. The Division of Labor Standards Enforcement, the California agency mandated to enforce the prevailing wage requirements of the California Public Works law (California Labor Code §§ 1720-1815) conducted an investigation concerning the payment of prevailing wages on the above projects and issued "Notices of Wages owed, Notices of Penalty Assessments, and Notices to Withhold (hereinafter referred to collectively as the "Notices"), to awarding bodies of the *prime contracts* of the Projects on account of the alleged failure of G&G to pay prevailing wages, including fringe benefits and apprenticeship-training fees, and to have otherwise complied with the prevailing wage and apprenticeship laws." (Complaint, 3; 13:18-26) (Emphasis added) As a result of the Notices directed to the awarding bodies, those awarding bodies withheld "not less than $100,000," from payments to the Prime Contractor (Complaint, 16) As a result of the above action, the "*Prime Contractors* for the Projects have withheld from Plaintiff not less than $100,000 due to the withholding from said *Prime Contractors* of monies due to the Notices." (Complaint, 18: 22-24).

Plaintiff alleges that "None of Defendants have provided, or offered to provide, Plaintiff or any of the Prime Contractors either a pre-deprivation hearing on the claims involved." (Complaint, 17).

To summarize, G&G has contracted with prime contractors to perform work on public work projects in the State of California. Because of the failure of G&G to pay the prevailing wage to the workmen it employed as required by Labor Code §§ 1771 and 1775, the public agency which awarded the public work contract withheld from the prime contractors with which the awarding body was contracting the difference between the wages paid and the prevailing wages due from the sums due under the contract with the awarding body. G&G, as a subcontractor of the prime contractor, is not in privity of contract with the awarding body. Thus, the sum withheld by the awarding body was not owed to G&G, but was withheld from sums which might have been due under the contract to the prime contractors.

The California prevailing wage law provides for notice with respect to the determination of the rate of prevailing wages to be paid on public works projects in the state. (Labor Code § 1773.2) The statutory scheme further provides a procedure for contesting the Director's determination of the prevailing rate of wages. (Labor Code § 1773.4) Thereafter, the prime contractor submits a bid based on the Director's determination with respect to prevailing wages to be paid, and the contract, subsequently awarded for said public work contains notice of the forfeiture to be made by the contractor if either he or his subcontractor fails to comply with the contractural provisions relating to the payment of prevailing wages. (Labor Code § 1775) Thus, the contractor cannot claim that he lacked notice of, or an opportunity to contest, the prevailing wage provision as determined by the Director.

O. G. Sansone v. Department of Transportation (1976) 55 Cal.App.3d 434, 455.

II. ARGUMENT

A. The Right Of The State To Prescribe The Conditions Upon Which It Will Permit Its Public Works To Be Performed May Not Be Questioned

The question of the right of the state to dictate the terms upon which it chooses to do business was addressed many years ago and is settled law at this point. The United States Supreme Court in the case of *Atkin v. Kansas* 191 U.S. 207 (1903) concluded:

> "It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that regard. Regulations on this subject suggest only considerations of public policy. *And with such considerations the courts have no concern.*" *Id.*, 191 U.S. at 222-223.

In 1932 the California Supreme Court had occasion to pass upon the constitutionality of the prevailing wage law in California and, relying heavily on the *Atkin* case, found that the law passed muster. *Metropolitan Water Dist.*

v. Whisett (1932) 215 Cal. 400. Again, in 1957, the California Appellate courts revisited the question in the case of *Madonna v. State of California* (1957) 151 Cal.App.2d 836, and, again, found the statutory scheme met the Fourteenth Amendment Due Process requirements.

B. Plaintiff's Injuries, Consisting Solely Of Indirect Adverse Effects of Governmental Action, Are Not Actionable

As pointed out hereinabove, the allegations of the Complaint in this case specify no direct action by Defendants against Plaintiff. On the contrary, it is indisputable from these allegations that the only action taken by Defendants, the issuance of the various notices (See Complaint, Paragraph 13), was taken solely against the prime contractors, who thereafter unilaterally chose to withhold monies from plaintiff for work performed under their subcontracts. By filing this action plaintiff is, in effect, trying to interject itself in a dispute between the prime contractors and the State of California. Defendants accordingly contend that these allegations, standing alone, are insufficient as a matter of law to state a claim for deprivation of due process.

More importantly, the Supreme Court has long held that facts such as those disclosed in the Complaint in this case cannot constitute a basis for relief under the due process clause.

"Over a century ago this Court recognized the principle that the due process provision of the Fifth Amendment does not apply to the *indirect adverse effects* of

governmental action. Thus, in the *Legal Tender Cases*, 12 Wall. 457, 551, the Court stated:

> 'That provision has always been understood as referring only to a *direct* appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that *indirectly* work harm and loss to individuals.' "

O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 788-789, 100 S.Ct. 2467 (1980) (Emphasis added).

In *O'Bannon* a group of patients sued to prevent a state from revocation of reimbursement of medical expenses to a medical facility where the patients lived without affording members of the group a hearing. The revocation, if upheld, would have required them to move to another facility in order to continue to be eligible for medical benefits. While they were all clearly injured by the impending revocation, the Supreme Court held that the detriment the patients experienced was only *indirect* because the action of the state was against the facility and not directly against them. Since they were only indirectly impacted, they could not claim a deprivation of due process because they were denied a hearing. As the Supreme Court took pains to point out, these patients' rights, if any, were against the hospital and not against the public entity.

This fundamental principle of constitutional law, that indirect deprivations of property rights are nonactionable, has been given wide ranging application in a variety of factual situations.

In *Castaneda v. U.S. Department of Agriculture*, 807 F. 2d 1478, 1480 (9th Cir. 1987), a store manager sued the Department of Agriculture because that agency had closed the store where he worked as a result of food stamp violations, causing him to lose his job. He claimed he had the right to a hearing prior to such action being taken. Relying on *O'Bannon*, the Ninth Circuit held that Castaneda had no due process claim because he was only indirectly adversely affected by the action of the Department of Agriculture.

In *Grove City College v. Bell*, 687 F. 2d 684, 704 (3rd Cir. 1982), a college refused to execute certain federal forms required under statutes administered by the United States Department of Education, causing that agency to revoke all student loans and aid at the college without affording a hearing to the affected students. Citing *O'Bannon*, the court held that the students had no claim for violation of due process because they were only indirectly affected by the Department of Education's action.

In *Nuclear Transport & Storage, Inc. v. United States*, 890 F. 2d 1348, 1354 (6th Cir. 1989), a radioactive waste storage company was impacted when the U.S. Department of Energy began offering free storage facilities to its customers without granting a hearing prior to taking this action. The court held the company was only indirectly impacted under the reasoning of *O'Bannon* and could therefore state no claim for violation of its due process rights.

There can be no logical distinction drawn between the position of the aggrieved parties in these cases and the position of plaintiff here. The State of California acted

to enforce its contractual and statutory rights solely with respect to the prime contractors. While plaintiff has undoubtedly suffered some initial detriment as a result of these prime contractors' withholding of funds, its rights, if any, are against the prime contractor and not these defendants. Any adverse impact which plaintiff has suffered is clearly indirect within the meaning of *O'Bannon* and its progeny and cannot give rise to a claim of deprivation of due process under the reasoning of those cases.

Based on the facts of this case, as alleged in the Complaint, it is apparent that plaintiff is, at best, only indirectly impacted by the action of defendants. It accordingly cannot state a claim upon which any relief can be granted and this action should accordingly be dismissed.

C. The Due Process Clause Does Not Guarantee Plaintiff A Predeprivation Hearing In This Case

The gravamen of the principle allegations of the Complaint is that plaintiff was denied a pre-deprivation hearing by defendants in violation of their due process rights (Complaint, 17). This contention presumes that plaintiff necessarily possessed a constitutional right to a pre-deprivation hearing, a presumption that is unwarranted in light of present day law.

The extent to which the due process clause mandates a hearing prior to the deprivation of property rights was carefully considered by the Supreme Court in *Mathews v. Elridge*, 424 U.S. 319, 333 (1976). That Court made clear that the question of whether a predeprivation hearing

must be afforded consistent with principles of due process was not a black and white matter. Reviewing the cases on this subject, the Court stated:

"These decisions underscore the truism that 'due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests affected." 424 U.S. at p. 334.

The Court pointed out that there were three factors which must be balanced to determine the need, if any, for a predeprivation hearing: 1. the private interest to be affected; 2. the risk of an erroneous deprivation of interest through the procedures used and the probably [sic] value of additional procedural safeguards; and 3. the government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.

424 U.S. at pp. 332-335.

Taking these factors in order, we note that the first factor, the private interest to be affected, is unquestionably an interest, as pointed out hereinabove, that is only indirectly impacted by the State of California, inasmuch as the Defendants' action was directed only to the prime contractors and not to plaintiff. Despite some superfluous references in the Complaint to the rights of the prime

contractors (see, e.g., Paragraph 17), plaintiff cannot stand in the shoes of these entities, entities that are not even before this court.

The interest of the State of California in preserving prevailing wage rates in public works contracts is treated more fully elsewhere in this memorandum. Suffice it to say at this point that Defendants' purposes in this area, including both the preservation of workers' economic rights and the prevention of unfair competition among competing contractors, is of compelling importance.

Under existing procedures, a prime contractor is empowered to bring suit against the contracting agency under California Labor Code Section 1773 for all wages and penalties alleged to have been improperly withheld. In view of the efficient processing of cases in the courts in Southern California through the ubiquitous fast track procedures, this constitutes a timely and appropriate means of review of State action in these cases. Such a remedy is consistent with enlightened concepts of due process.

Under the circumstances reflected in the allegations of the Complaint, it is apparent that the procedures afforded by Defendants for postdeprivation review by the courts of the validity of the withholding of wages and penalties is not violative of due process.

D. The California Public Works Statutory Scheme, Which Recognizes A Contractual Relationship Between The Awarding Body And The Prime Contractor, Does Not Recognize Privity Of Contract With Subcontractors, and, Thus, State Law Does Not Recognize A Right In A Subcontractor To Claim Money Due Under A Contract Between An Awarding Body And A Prime Contractor

The California courts have consistently held that the right of a subcontractor to recover sums it alleges are due for work performed on a public works project is limited to the rights it has under the stop notice provisions of the California Civil Code. *Cal-Pacific Materials Co. v. Redondo Beach City School District* (1979) 94 Cal.App.3d 652, 655. The *Cal-Pacific* court described the doctrine of privity of contract and explained the remedies available to a subcontractor or materialman:

> "School District contracted with Willens [the prime contractor] and not with Cal-Pacific. Cal-Pacific sold its materials to Western States, Willen's subcontractor, and not to School District. Lack of privity thus precludes recovery by Cal-Pacific unless recovery is permitted because of the stop notice." *Cal-Pacific Materials, supra,* at 656.

In dealing with the prevailing wage statutes, privity of contract is required in order to recover sums "forfeited" by the prime contractor as a result of the failure of that contractor "or by any subcontractor under him or her[1]" to pay the prevailing wage. As described below, the statutory scheme provides only that the prime contractor

(or his assignee) has the right to recover the sums withheld *under the contract.*

B. The California Public Works Law Requires That Any Action To Recover Sums Held By An Awarding Agency Must Be Brought By The Contractor or His Assignee

California Labor Code § 1775 provides that the awarding body must insert in every public works contract a provision which requires the payment of prevailing wages and allows the withholding of wages and penalties in the event of a breach of that provision.

> California Labor Code § 1733 provides, *inter alia*: "Suit may be brought *by the contractor or his or her assignee* without permission from the state or other authority and is limited to the recovery of the wages and penalties without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract . . . " (Emphasis added)

California Labor Code § 1732 provides that the time to bring an action "on the contract" to recover the penalties and wages shall be limited to 90 days and is *the exclusive remedy* of the *contractor or his assignee.* The California Supreme Court has stated that "Labor Code section 1732 provides that a contractor's 'exclusive remedy' for the recovery of penalties assessed under section 1850 shall consist of an action against the awarding body *of his contract* to perform public work under section 1731-1733." *Purdy & Fitzpatrick v. State of California* (1969) 71 Cal.2d 566, 586. (Emphasis added)

Again, the requirement under California law is that the prime contractor is contractually responsible for the payment of the prevailing wage (Labor Code § 1775). Failure of either the prime or his subcontractors to pay the prevailing wage is a breach of the prime contractor's contract with the awarding body. Thus, California law, not surprisingly, requires there must exist privity of contract (or an assignment of the contract right) in order to have standing to recover sums withheld from the contract price for breach of the contract occasioned by the failure of either the contractor or subcontractors under him to pay the prevailing wage. (Labor Code §§ 1730-1733) This requirement is certainly not unique. Common law contract concepts have always required privity in order to bring an action to enforce a contract.

Even the complaint filed by G&G in this action admits that the sums withheld by the awarding body were withheld from the prime contractor, not G&G. The funds were withheld from amounts which *may* have been due the prime contractors under the *contract*. Had insufficient sums been withheld from the prime contractor, the state agency mandated to enforce the prevailing wage law would have been required to bring an action against the prime contractor (not the subcontractor) to recover the wages.

G&G was not a party to the contract between the awarding body and the prime contractors and has no right to recover sums which might be due under that contract just as there is no provision in the prevailing wage law which would allow the state to recover the wages from the subcontractor. Thus, there was no "taking" from the plaintiff and the actions by the state are not

within the "zone of interest" protected by the Fourteenth Amendment. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883, (1990)

In sum, there is no right of G&G to "entitlement . . . defined by existing rules or understandings that stem from . . . state law." *Russell v. Landrieu, supra*, 621 F.2d at 1040. Thus, G&G enjoys no "property interest" in the sums withheld.

C. G&G Does Not Have Standing To Bring This Action To Remedy Rights Under These Public Works Contracts Since It Was Not A Party To Those Contracts

The constitutional provision defining the judicial power of the United States extends the power to cases arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority.

> "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise . . . In both dimensions it is founded in concern about the proper – and properly limited – role of the courts in a democratic society. [sic] The constitutional limits on standing eliminate claims in which the plaintiff has failed to make out a case or controversy between himself and the defendant. In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the

putatively illegal conduct of the defendant." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979).

In this case, where the gravamen of G&G's action is an effort to have the provisions of the Labor Code dealing with the withholding of sums from the general or prime contractor declared unconstitutional as applied to plaintiff, there must be a deprivation of some right which inures to a contractor in G&G's position as a result of the actions by the state agency. But, as pointed out above, G&G has no right to the money withheld by the awarding body and, consequently, can suffer no "injury" attributable to the state or its agencies.

Again, in sum, what G&G's allegations fail to establish is that it has any standing to recover the monies withheld by the awarding body pursuant to the contract between the awarding body and the prime contractor – a contract which does not benefit or relate to G&G. Specifically, G&G asks that this court declare Code §§ 1727, 1729, 1730, 1732, 1733 and 1775 unconstitutional. But pertinent Labor Code sections cited above have no affect [sic] on subcontractors performing public works in California. The cited sections constitute the statutory scheme in California designed to enforce the prevailing wage law through withholding from sums due to *prime contractors under the contract* when they are contracting with awarding bodies. Pursuant to § 1727, for instance, "Deficiencies and penalties are to be withheld by the awarding body from sums due *under the contract*." *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 986. (Emphasis added) Labor Code §§ 1730 provides that the awarding body is to transfer all wages and penalties that have been withheld

pursuant to § 1727 (i.e., under the contract) to the Labor Commissioner. Labor Code § 1732 provides the time frame within which the prime contractor (or his assignee) must bring and [sic] action to recover the sums withheld. The action is to be "on the contract for alleged breach thereof in not making the payment" and this suit is "the exclusive remedy" of the contractor or his assignee. Section 1733 provides that the burden of proof is upon the "contractor or his or her assignee to establish his or her right to the wages and penalties withheld."

Under the clear language of the California Prevailing Wage law it is the contractor who bears liability for wage underpayments made by subcontractors. (Labor Code § 1775) This interpretation comports with case law. In *O. G. Sansone v. Department of Transportation* (1976) 55 Cal.App.3d 434, the prime contractor subcontracted a portion of a public works project to a subcontractor, who then subcontracted a portion of his work. Neither subcontractor paid the prevailing wage to its workers. The state withheld payment to the general contractor to cover the underpayment and the Court of Appeal concluded that this was proper:

> "Plaintiffs entered into a contractural agreement to the effect that they would comply with . . . section 1775 and that they would forfeit to the state $25 per day for each workman paid less than the prevailing wage by either plaintiffs or by their subcontractors, as well as pay to each workman the difference between the prevailing wage and the amount the workman had received. Thus, when [the] subcontractors . . . failed to pay prevailing wages to their workmen, plaintiffs became contractually liable to

pay the penalty to the state as well as to pay the wronged workmen the difference in wages." *Id.*, at 462-463.

D. Plaintiffs Lack Standing To Bring This Action On Behalf Of The Prime Contractors Who Are In Privity Of Contract With The Awarding Bodies

One of the elements of standing under Article III is that "the plaintiff must establish that the injury can be fairly traced to the Defendant's challenged conduct and is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 472; *LaDuke v. Nelson*, 762 F.2d 1318, 1323 (9th Cir.1985).

In addition to the constitutional requirements of Article III there exist "prudential limitations" which must be met. Here, G&G must assert its own rights and can neither assert nor rely upon the interests of others. *Valley Forge Christian College, supra*, 454 U.S. at 472. In this case, the facts alleged by G&G indicate that the alleged "injury" to itself is "not redressable by a favorable decision," *Valley Forge Christian College, supra*, at 472; *LaDuke, supra*, 762 F.2d at 1323, for even in the unlikely event that this court were to find that the withholding from the prime contractor under the terms of its contract with the awarding body was violative of the Due Process Clause, there is no showing by G&G that the prime contractor would have paid the money over to G&G.

In addition, as the Supreme Court's discussion of third party rights in *Singleton v. Wulff*, 428 U.S. 106 (1976)

reveals, G&G must overcome the two-fold prohibition against assertion of third party rights. As the Court noted, such assertion should be the exception and not the rule. *Id.* at 114.

The Supreme Court has more recently addressed the issue of standing to protect the rights of third parties in the case of *Powers v. Ohio*, 499 U.S. 400, (1991). The *Powers* court first restated the long-standing rule: "In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief premised on the legal rights or interests of third parties." *Id.*, at 412. The Court then relied upon *Singleton, supra*, for the proposition that "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter," *Powers, supra*, at 413, citing *Singleton, supra*. 428 U.S. at 115. The Court noted that in the case before it "there can be no doubt that petitioner will be a motivated, effective advocate for the excluded venirepersons rights." *Powers, supra*, 499 U.S. at 413, and spoke of "this congruence of interests [which] makes it . . . appropriate for the defendant to raise the rights of the [third party]." *Id.*, at 414. The third party "right" which both *Powers* and *Singleton* chose to protect was a constitutionally protected right which the parties held, in common, with all citizens. The right of the juror to serve and the right of the defendant to have that juror serve were not in any way inconsistent.

Here, on the other hand, G&G seeks to represent the interests of prime contractors who have withheld "not less than $100,000.00" from G&G and who, incidentally,

have failed to provide G&G with an assignment necessary to recover any of this amount. The fact that these prime contractors did not make such an assignment is instructive for there appears to be a lack of a "congruence of interests" between G&G and the prime contractors such that G&G might no [sic] be a "motivated, effective advocate" of the rights of the prime contractors.

1. Even If The Plaintiff Had Standing On Behalf Of The Prime Contractors To Question The Actions Of The State In Ordering The Withholding of Unpaid Wages, The Attack On Constitutional Grounds Must Fail

Even if G&G were allowed to attack the constitutionality of the statute in the stead of the prime contractors, G&G would be in no better position than those it would then represent. There is little doubt that the prime contractors who entered into the contracts with the awarding bodies have benefitted from the fact that they did business with the state under the terms of the Act. These contractors would now be estopped to bring an action to test the constitutionality of the statutory scheme which allows the awarding body to withhold sums due under the contract. The admonition of the U.S. Supreme Court in the case of *Fahey v. Mallonee*, 332 U.S. 245, 255 (1947) would be appropriate:

> "It is an elementary rule of constituional law that one may not retain the benefits of the Act while attacking the constitutionality of one of its important conditions. The Court will not pass upon the constitutionality of a statute at the

> instance of one who has availed himself of its benefits.' "

See also *Foster v. Superior Court*, 26 Cal.App.2d 230, 234, *Tracy v. McIntyre*, 29 Cal.App.2d 145, and *Madonna v. State of California*, 151 Cal.App.2d 836.

E. The Individual Defendants Are Immune From Suit In This Action

Plaintiff has forborn from suing agencies of the State of California in this case and has named solely the following public officials: Victoria Bradshaw, as the Labor Commissioner, Lloyd W. Aubry, Jr., as the Director of the Department of Industrial Relations, Daniel Dellarocca, as a Deputy Labor Commissioner, Roger Miller, as a Deputy Labor Commissioner, and Rosa Frazier, as a Deputy Labor Commissioner. It is well settled that a qualified immunity shields public officials whose conduct "does not violate clearly statutory or constitutional rights of which a reasonable person must have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982); *Anderson v. Creighton*, 483 U.S. 635, 639-640, 107 S.Ct. 3034 (1987); *Ericson v. U.S.*, 976 F. 2d 1299, 1301 (9th Cir. 1992).

The sole allegation against these officials is that they issued certain notices to awarding bodies contracting with the prime contractors regarding the failure to pay prevailing wage rates on the projects involved, doing so without affording plaintiff or its prime contractors a hearing (Complaint, 13 and 14).

Even if plaintiff could prevail on its aforementioned constitutionality contentions, it is apparent that these

officials were only performing their legislatively assigned duties in enforcing and implementing provisions of the California Labor Code and could have no reason to believe that these provisions were unconstitutional in any respect. The Complaint in this suit is clearly defective in this regard in that it contains no allegations that any of these offficials [sic] knowingly violated any statute or knowingly violated any of plaintiff's constitutional rights.

III. CONCLUSION

The withholding of wages and penalties under the Prevailing Wage Rate Act of which the plaintiffs complain was solely and totally from sums due the prime contractors, such withholding having been made as a result of a provision in the contract between the awarding body and the prime contractors. Plaintiffs are not in privity of contract and cannot complain of the actions taken under the contract. Further, even if the plaintiffs did have the standing to bring this action on behalf of the prime contractors, the withholding was not a violation of due process because plaintiff was only indirectly impacted by this action. Finally, Plaintiff has failed to overcome the presumption of immunity of public officials inasmuch as it has failed to allege that Defendants knowingly violated

its legal or constitutional rights in withholding funds from the prime contractors.

Dated: August 16, 1995

Respectfully submitted,

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California

By: /s/ Thomas Kerrigan
THOMAS S. KERRIGAN
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; and Does 1 through 20, Defendant/Appellant	CASE NO. 94-8542-R [Proposed] ORDER

The motion of defendants to dismiss plaintiff's complaint was regularly heard on the above date and time. Appearing as attorneys were Thomas S. Kerrigan for defendants, and Stephen A. Seideman for plaintiff.

After considering all papers filed in this action, and the argument of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED that:

1. Plaintiff's complaint be dismissed in its entirety.

DATED: _____

_____
EDWARD RAFEEDI
U. S. District Court Judge

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as	CIVIL NO. 95-4839 E (BQRx) R FIRST AMENDED COMPLAINT FOR: 1: DECLARATORY RELIEF (UNCONSTITUTIONAL APPLICATION OF STATE LAWS) 42 U.S.C. §1983, 28 U.S.C. §2201 2. DECLARATORY RELIEF (FACIAL UNCONSTITUTIONALITY OF STATE LAWS) 3. INJUNCTION 42 U.S.C. §1983 28 U.S.C. §2202 AND DEMAND FOR TRIAL BY JURY

Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20, Defendants.	

Plaintiff, G & G FIRE SPRINKLERS, INC., ("Plaintiff") alleges:

FIRST CLAIM FOR RELIEF

(Declaratory Relief)

1. Jurisdiction of this action is conferred on this United States District Court by the provisions of 42 U.S.C. §1983, 28 U.S.C. §1343(a)(4), and 28 U.S.C. §2201-2202 inasmuch as this action is to redress a deprivation of civil and constitutional rights guaranteed by the Fourteenth Amendment to the United States Constitution by persons acting under color of state law, to secure a declaration of rights to an actual controversy concerning the unconstitutional application of certain California Labor Code provisions to Plaintiff by Defendants, and Plaintiff's assertions

concerning the facial unconstitutionality of those provisions, and to restrain and enjoin Defendants from enforcing the unconstitutional provisions in the future.

2. Venue of this action is proper in this Court under the provisions of 28 U.S.C. §1391(b) inasmuch as Defendants, or some of them, are either residents of or maintain official offices and places of business within the judicial district of this Court, the United States District Court, Central District of California. Further, Plaintiff conducts business within the county of Los Angeles, California, within this judicial district, and Defendants' conduct alleged herein has affected Plaintiff at its offices and its construction projects located within the judicial district of this Court.

3. Plaintiff is now, and at all times herein mentioned has been, a corporation organized and existing under and by virtue of the laws of the State of California, which does business in, among other places, Los Angeles, California, County of Los Angeles, and with its principal place of business in Culver City, County of Los Angeles, California. Plaintiff is now, and at all times herein mentioned has been, engaged in business as a fire protection contractor duly licensed under the laws of the State of California.

4. (a) Defendant VICTORIA BRADSHAW ("BRADSHAW") is, and at all times herein mentioned has been, Chief of the Division of Labor Standards Enforcement ("DLSE"), (also known as the Labor Commissioner) Department of Industrial Relations, State of California, and, as such, is the public officer of the State of California responsible for enforcement of the State's "prevailing

wage and apprenticeship" laws (*California Labor Code* §§ 1720-1815).

(b) Defendant BRADSHAW is sued herein in her official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. §1983.

5. (a) Defendant LLOYD W. AUBRY, JR. ("AUBRY") is, and at all times herein mentioned has been, Director of the Department of Industrial Relations, State of California, and as such is the public executive officer of the State of California responsible for the overall interpretation and enforcement of the State of California's wage and hour laws, including the "prevailing wage and apprenticeship" laws.

(b) Defendant AUBRY is sued herein in his official capacity, and is a "person" amenable to suit within the meaning of U.S.C. §1983.

6. (a) Defendant DANIEL DELLAROCCA ("DELLAROCCA") is, and at all times herein mentioned has been, a Deputy Labor Commissioner of the Division of Labor Standards Enforcement (hereinafter "DLSE"), Department of Industrial Relations, State of California, a public officer of the State of California, and, as such, is one of the public officers of the State of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws.

(b) Defendant DELLAROCCA is sued herein in his official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. §1983.

7. (a) Defendant ROGER MILLER ("MILLER") is, and at all times herein mentioned has been, a regional

manager and/or Senior Deputy Labor Commissioner of the Division of Labor Standards Enforcement ("DLSE"), Department of Industrial Relations, State of California, a public officer of the State of California, and, as such, is one of the public officers of the State of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws.

(b) Defendant MILLER is sued herein in his official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. §1983.

8. (a) Defendant ROSA FRAZIER ("FRAZIER") is, and at all times herein mentioned has been, a regional manager and/or Senior Deputy Labor Commissioner of the Division of Labor Standards Enforcement ("DLSE"), Department of Industrial Relations, State of California, a public officer of the State of California, and, as such, is one of the public officers of the State of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws.

(b) Defendant FRAZIER. is sued herein in her official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. §1983.

9. Defendants MILLER, FRAZIER, BRADSHAW and AUBRY, and each of them, maintain offices and do business throughout the State of California, and maintain offices and do business in Los Angeles, County of Los Angeles, State of California.

10. Defendant DIVISION OF LABOR STANDARDS ENFORCEMENT ("DLSE"), is, and at all times herein mentioned has been, an agency of the State of California.

11. Defendant DEPARTMENT OF INDUSTRIAL RELATIONS ("DIR") is, and at all times herein mentioned as [sic] been, an agency of the State of California.

12. Defendants DLSE and DIR, and each of them, maintain offices and do business throughout the State of California, and maintain offices and do business in Los Angeles, County of Los Angeles, State of California.

13. Plaintiff is ignorant of the true names and capacities of the defendants sued herein as Does 1 through 20, inclusive, and therefore sues the defendants by such fictitious names.

14. Plaintiff has performed work both as a subcontractor and prime contractor on various public works projects which are subject to the prevailing wage requirements set forth in the California Labor Code.

15. Plaintiff intends to continue performing work on public works projects in California as a subcontractor and prime contractor.

16. Defendants, acting under color of California Labor Code §§ 1727-1731, 1774, 1775, 1777.5 and 1815, issued Notices of Wages owed, Notices of Penalty Assessments, and Notices to Withhold (hereinafter referred to collectively as the "Notices"), to awarding bodies of the prime contracts on public works projects on account of the alleged failure of Plaintiff to pay prevailing wages, including fringe benefits and apprenticeship-training fees, and to have otherwise complied with the prevailing wage and apprenticeship laws. Defendants also issued a Notice of Penalty Assessment purportedly pursuant to

Cal. Labor Code §1776. The Notice of Penalty Assessment was issued without prior notice.

17. Prior to issuing the Notices mentioned in Paragraph 16, above, Defendants did not provide Plaintiff, or the Prime Contractors who employed Plaintiff with any hearing with respect to the allegations or potential forfeitures or penalties, or with respect to the reasons for them, or with respect to the total of the alleged amounts due.

18. The amount presently withheld as a result of such notices is more than $135,000.

19. The awarding bodies continue to withhold not less than $135,000 from the Prime Contractors who employed Plaintiff, on account of the Notices.

20. None of Defendants have provided, or offered to provide, Plaintiff or any of the Prime Contractors either a pre-deprivation or post-deprivation hearing on the claims involved.

21. California Labor Code §1729 provides:

> "1729. It shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the subcontractor's failure to comply with the terms of this chapter, and if payment has already been made to the subcontractor the contractor may recover from him the amount of the penalty or forfeiture in a suit at law."

The Prime Contractors for the Projects have withheld from Plaintiff not less than $135,000 due to the withholding from said Prime Contractors of monies due to the Notices.

22. Defendants stated to Plaintiff that there is no right to a pre-deprivation hearing. Defendants stated to Plaintiff that Labor Code §1732 provides that a lawsuit by the contractor or his assignee pursuant to Labor Code §1731 et seq. is the exclusive remedy of the contractor or his assignee with regard to wages and/or penalties withheld. Plaintiff has been deprived of the sum of not less than $135,000 in earned progress payments due it under its contracts for the Projects.

23. There was no hearing held prior to the issuance of any of the Notices. There is no procedure for a prompt post-withholding hearing with regard to such notices to withhold. There is no requirement that Defendants ever carry any burden to justify the issuance of a notice to withhold. There is no procedure to protect against the issuance of notices to withhold in an excessive amount, resulting in withholding of excessive amounts of money.

24. The issuances of the notices to withhold by DLSE are not necessary to the implementation or enforcement of the prevailing wage laws. There are no emergency circumstances which necessitatc the issuance of notices to withhold without a hearing and/or other reasonable and appropriate procedures.

25. The notices to withhold issued by the DLSE on account of alleged violations by Plaintiff at the above mentioned projects are wrongful, incorrect, and excessive, and were issued arbitrarily and unreasonably.

26. The issuance of the notices to withhold caused Plaintiff to be deprived of property in the form of substantial sums of money as the statutory provisions purported to be enforced by DLSE provide that upon the

withholding of money from a prime contract by an awarding body, the contractor may withhold said money from the subcontractor. Thus, the notices to withhold issued by the DLSE were intended to, and did, cause Plaintiff to suffer a deprivation of property.

27. By the acts and conduct set forth above, Defendants have deprived Plaintiff of its property without due process of law in contravention of Section 1 of the Fourteenth Amendment.to the U.S. Constitution. Plaintiff is informed and believes and thereupon alleges that Defendants so deprived Plaintiff with knowledge that their actions were in violation of the U.S. Constitution. A reasonable person with knowledge of the facts and information known and available to Defendants would know that the actions as hereinabove alleged were unconstitional.

28. There is now existing between Plaintiff on the one hand, and Defendants, and each of them, on the other hand, an actual, justiciable controversy with respect to which Plaintiff is entitled to have a declaration of its rights and equitable relief, because of the facts, conditions, and circumstances set forth above.

29. (a) Plaintiff is entitled to a declaration of its rights declaring the acts of Defendants, and each of them, have been and are invalid, illegal, and in deprivation of Plaintiff's due process and property rights guaranteed by the Section 1 of the Fourteenth Amendment to the Constitution of the United Sates, [sic] that the Notices are invalid and of no legal effect.

(b) Plaintiff has been required to employ attorneys to vindicate its belief that the provisions of the

California Labor Code set forth herein are unconstitutional on their face and as applied, and to prosecute this action, and is entitled to an award of attorney's fees pursuant to the provisions of 42 U.S.C. §1988.

SECOND CLAIM FOR RELIEF

(Declaratory Relief)

(Facial Unconstitutionality of State Laws)

30. Plaintiff realleges and incorporates by this reference herein each and every allegation contained in paragraphs 1 through 29 of the First Claim for Relief as though fully set forth herein.

31. (a) Insofar as is relevant herein, *California Labor Code* §§1727, 1730, 1732, 1733, 1775, and 1776(g), provide:

§1727. Withholding of Forfeited Sums

"Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all wages and penalties which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Standards Enforcement or by the awarding body. (1937 ch. 90, 1431, 1992 ch. 1342)"

§1730. Transfer of Wages and Penalties to Labor Commissioner

"Every awarding body shall transfer all wages and penalties that have been withheld pursuant to Section 1727 to the Labor Commissioner, for disbursement pursuant to Section 1775, whenever a contractor fails to bring a suit against the awarding body for recovery of wages and penalties that are withheld pursuant to Section 1727 within 90 days after the completion of the contract and formal acceptance of the job. (1992 ch. 1342)"

§1733. Recovery of Wages and Penalties – Suit

"Suit may be brought by the contractor or his or her assignee without permission from the state or other authority and is limited to the recovery of the wages and penalties without prejudice to the contractors or assignee's rights in regard to other matters affecting the contract. No other issues shall be presented to the court in the case and the burden shall be on the contractor or his or her assignee to establish his or her right to the wages or penalties withheld. The Division of Labor Standards Enforcement may intervene in any court proceeding brought pursuant to this section. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on motion of the awarding body or the Division of Labor Standards Enforcement.

The Division of Labor Standards Enforcement may, upon written request of any awarding body, assist in the defense of the action.

(1937 ch. 90, 1957 ch. 398, 1988 ch. 160, 1992 ch. 1342)"

§1775. Payment Less Than Stipulated Rate – Penalty

"The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part."

§1776. Payroll records: retention: inspection; noncompliance penalties; rules and regulations

"(g) The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this section. In the event that

the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due."

(b) On their face, Sections 1727, 1729, 1730, 1732, 1733, 1775 and 1776, deny and deprive persons of their property without due process of law in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, inasmuch as said Sections authorize the deprivation of property without notice or hearing, and provide for the imposition of penalties and forfeitures without notice or hearing.

(c) Defendants presently maintain a policy and practice pursuant to *California Labor Code* §§1720-1815 which authorizes the withholding of monies from Contractors and Subcontractors who perform services on Public Works Projects, as well as the imposition of penalties and forfeitures, without providing such Contractors and Subcontractors any prior notice or prior hearing for alleged violations of said Sections.

(d) Plaintiff has been required to employ attorneys to vindicate its belief that the provisions of the California Labor Code set forth herein are unconstitutional on their face and as applied, and is entitled to an award of attorneys fees pursuant to the provisions of 42 U.S.C. §1988.

THIRD CLAIM FOR RELIEF

(Injunction)

32. Plaintiff realleges and incorporates by this reference herein each and every allegation contained in paragraphs 1 through 31 above as though fully set forth herein.

33. The actions and conduct of Defendants have caused Plaintiff to suffer great and irreparable injury and unless the Court issues relief by way of a Temporary Restraining Order, Preliminary and Permanent Injunction, Plaintiff and other contractors will suffer great and irreparable injury in that Plaintiff and other contractors will (1) be deprived of its property without due process of law; (2) be liable for civil penalties and back wage forfeitures; (3) be required to expend time and money; and (4) be exposed to unfavorable publicity which will injure its reputation as a reputable construction firm resulting in loss of business.

34. Plaintiff does not have an adequate remedy at law because (1) the pecuniary damages which it might suffer are presently difficult or impossible to fully ascertain; and (2) the irreparable injury to Plaintiff's reputation cannot be fully compensated by money damages. Further, since the provisions of the California Labor Code set forth herein are unconstitutional on their face, as well as in application to Plaintiff, Defendants' conduct in continuing to maintain and enforce such unconstitutional provisions entitles Plaintiff to injunctive relief to enjoin such provisions.

35. Plaintiff has been required to employ attorneys to vindicate its belief that the provisions of the California Labor Code set forth herein are unconstitutional on their face and as applied, and is entitled to an award of attorneys' fees pursuant to the provisions of 42 U.S.C. §1988.

PRAYER

WHEREFORE, Plaintiff prays for judgment as follows:

1. **ON ITS FIRST CLAIM FOR RELIEF**:

   a. For a Declaration Of Rights in Plaintiff's favor that as applied to Plaintiff, *California Labor Code* §§1720-1815 are unconstitutional as a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that the Notices are-invalid and of no legal effect;

   b. For Costs of Suit;

   c. For Attorneys' Fees pursuant to Section 42 U.S.C. 1988;

   d. For such other relief as is just and proper.

2. **ON ITS SECOND CLAIM.FOR RELIEF:**

   a. For a Declaration Of Rights in Plaintiff's favor that on their face, *California Labor Code* §§1727, 1729, 1730, 1732, 1733, 1775 and 1776 are unconstitutional as a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States;

   b. For Costs of Suit;

   c. For Attorneys' Fees pursuant to Section 42 U.S.C. 1988;

   d. For such other relief as is just and proper.

3. **ON ITS THIRD CLAIM FOR RELIEF**:

   a. For a Temporary Restraining Order, Preliminary and Permanent Injunction enjoining Defendants, and each of them, and their agents, employees, attorneys, representatives, as well as all those persons acting in active concert or participation with them, including representatives of the awarding bodies from enforcing, or threatening to enforce, the provisions of *California Labor Code* §§1727, 1729, 1775 or 1776 against Plaintiff, or any other person, with regard to any "public works" project, including, without limitation, imposing, or threatening to impose, civil penalties against any person, including Plaintiff; issuing Notices to Withhold with regard to Plaintiff and/or any other person;

   b. For Costs of Suit;

   c. For Attorneys' Fees pursuant to Section 42 U.S.C. 1988;

   d. For such other relief as is just and proper.

DATED: September 6, 1995

LEVIN, STEIN, CHYTEN
& SCHNEIDER

By: /s/ Stephen A. Seideman
Stephen A. Seideman, Esq.
Attorneys for Plaintiff
G & G FIRE SPRINKLERS, INC.

DEMAND FOR TRIAL BY JURY

Plaintiff hereby demands trial by jury..

DATED: September 6, 1995

LEVIN, STEIN, CHYTEN
& SCHNEIDER

By: /s/ Stephen A. Seideman
Stephen A. Seideman, Esq.
Attorneys for Plaintiff
G & G FIRE SPRINKLERS, INC.

(Certificate Of Service Omitted In Printing)

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
By: THOMAS S. KERRIGAN, Bar No. 36003
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Attorney for the Labor Commissioner

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL	CASE NO. 95-4839 R (BQRx) NOTICE OF MOTION AND MOTION TO DISMISS [F.R.C.P. Rule 12(b)] DATE: November 6, 1995 TIME: 10 a.m. Courtroom No. 8, (Filed ___)

RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

TO THE ABOVE-NAMED PLAINTIFF AND TO ITS ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on November 6, 1995 at 10 a.m., or as soon thereafter as the matter can be heard, in Courtroom No. 8 of the Honorable Manuel Real, District Court Judge, located at 312 N. Spring Street, Los Angeles, California, defendants will move the Court for an order dismissing this case pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.

The motion will be made on the grounds that the Complaint fails to state a claim upon which any relief can be granted and that Plaintiff has no standing to assert the challenges contained in its complaint.

The motion will be based on this Notice of Motion, the accompanying memorandum of points and authorities, and the pleadings, files and records in this action.

DATED: September 19, 1995

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
By: /s/ Thomas S. Kerrigan
THOMAS S. KERRIGAN
Attorney for State Defendants

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
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Attorney for the Labor Commissioner

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC.,

Plaintiff,

vs.

VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official

CASE NO. 95-4839 R (BQRx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

DATE: November 6, 1995
TIME: 10 a.m.
COURTROOM: No. 8

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

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I. INTRODUCTION

A. Factual Background

Plaintiff G&G Fire Sprinklers, Inc. (hereinafter "G&G"), performed work as a subcontractor on certain State of California public work projects. The Division of Labor Standards Enforcement, the California agency mandated to enforce the prevailing wage requirements of the California Public Works law (California Labor Code §§ 1720-1815) conducted an investigation concerning the payment of prevailing wages on the above projects and issued "Notices of Wages owed, Notices of Penalty Assessments, and Notices to Withhold (hereinafter referred to collectively as the "Notices"), to awarding bodies of the *prime contracts* of the Projects on account of the alleged failure of plaintiff to pay prevailing wages, including fringe benefits and apprenticeship-training fees, and to have otherwise complied with the prevailing wage and apprenticeship laws." As a result of the Notices directed to the awarding bodies, those awarding bodies withheld "not less than $135,000" from payments to the Prime Contractor (Complaint, paragraph 21) Because of the above action, the "*Prime Contractors* for the Projects have withheld from Plaintiff not less than $135,000 due to the withholding from said *Prime Contractors* of monies due to the Notices." (Complaint, Paragraph 21). (Emphasis added).

Plaintiff alleges that "None of Defendants have provided, or offered to provide, Plaintiff or any of the Prime Contractors either a pre-deprivation or post-deprivation hearing on the claims involved." (Complaint, Paragraph 20).

To summarize, G&G has contracted with prime contractors to perform work on public work projects in the State of California. Because of the failure of G&G to pay the prevailing wage to the workmen it employed as required by Labor Code §§ 1771 and 1775, the public agency which awarded the public work contract withheld from the prime contractors with which the awarding body was contracting the difference between the wages paid and the prevailing wages due from the sums due under the contract with the awarding body. G&G, as a subcontractor of the prime contractor, is not in privity of contract with the awarding body. Thus, the sum withheld by the awarding body was not owed to G&G, but was withheld from sums which might have been due under the contract to the prime contractors.

The California prevailing wage law provides for notice with respect to the determination of the rate of prevailing wages to be paid on public works projects in the state. (Labor Code § 1773.2) The statutory scheme further provides a procedure for contesting the Director's determination of the prevailing rate of wages. (Labor Code § 1773.4) Thereafter, the prime contractor submits a bid based on the Director's determination with respect to prevailing wages to be paid, and the contract, subsequently awarded for said public work contains notice of the forfeiture to be made by the contractor if either he or his subcontractor fails to comply with the contractural provisions relating to the payment of prevailing wages. (Labor Code § 1775) Thus, the contractor cannot claim that he lacked notice of, or an opportunity to contest, the prevailing wage provision as determined by the Director.

O. G. Sansone v. Department of Transportation (1976) 55 Cal.App.3d 434, 455.

B. Prior Proceedings

Plaintiff filed the original complaint in this action on July 21, 1995, alleging a claim for Declaratory and Injunctive Relief under 42 U.S.C. § 1983. The only defendants designated therein were the California Labor Commissioner and members of her staff. No agency was named as a defendant. Defendants filed a Motion to Dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, raising, among other defenses, the doctrine of the qualified immunity of these employees based on *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and its progeny.

In a patent attempt to cure this defect, plaintiff recently filed its First Amended Complaint. This pleading alleges for the first time in new Paragraph 27 the purported knowledge of these individual defendants that "their actions were in violation of the U.S. Constitution" (First Amended Complaint, p. 8). Furthermore, plaintiff has now named the Division of Labor Standards Enforcement and the Department of Industrial Relations as additional defendants.

As will be seen more fully hereinafter, plaintiff's belated attempts to circumvent the qualified immunity doctrine have been unavailing since under no theory of the facts of this case can these individual defendants have any liability to plaintiff.

II. ARGUMENT

A. The Right Of The State To Prescribe The Conditions Upon Which It Will Permit Its Public Works To Be Performed May Not Be Questioned

The question of the right of the state to dictate the terms upon which it chooses to do business was addressed many years ago and is settled law at this point. The United States Supreme Court in the case of *Atkin v. Kansas* 191 U.S. 207 (1903) concluded:

> "It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that regard. Regulations on this subject suggest only considerations of public policy. *And with such considerations the courts have no concern.*" *Id.*, 191 U.S. at 222-223.

In 1932 the California Supreme Court had occasion to pass upon the constitutionality of the prevailing wage law in California and, relying heavily on the *Atkin* case, found that the law passed muster. *Metropolitan Water Dist. v. Whisett* (1932) 215 Cal. 400. Again, in 1957, the California Appellate courts revisited the question in the case of *Madonna v. State of California* (1957) 151 Cal.App.2d 836, and, again, found the statutory scheme met the Fourteenth Amendment Due Process requirements.

B. Plaintiff is Injuries, Consisting Solely Of Indirect Adverse Effects of Governmental Action, Are Not Actionable

As pointed out hereinabove, the allegations of the Complaint in this case specify no direct action by Defendants against Plaintiff. On the contrary, it is indisputable from these allegations that the only action taken by Defendants, the issuance of the various notices (See Complaint, Paragraph 16), was taken solely against the prime contractors, who thereafter unilaterally chose to withhold monies from plaintiff for work performed under their subcontracts. By filing this action plaintiff is, in effect, trying to interject itself in a dispute between the prime contractors and the State of California. Defendants accordingly contend that these allegations, standing alone, are insufficient as a matter of law to state a claim for deprivation of due process.

More importantly, the Supreme Court has long held that facts such as those disclosed in the Complaint in this case cannot constitute a basis for relief under the due process clause.

"Over a century ago this Court recognized the principle that the due process provision of the Fifth Amendment does not apply to the *indirect adverse effects* of governmental action. Thus, in the *Legal Tender Cases*, 12 Wall. 457, 551, the Court stated:

> 'That provision has always been understood as referring only to a *direct* appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that *indirectly* work harm and loss to individuals.' "

O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 788-789, 100 S.Ct. 2467 (1980) (Emphasis added).

In *O'Bannon* a group of patients sued to prevent a state from cutting off reimbursement of medical expenses to a medical facility where the patients lived without affording members of the group a hearing. The revocation, if upheld, would have required these patients to move to another facility in order to continue to be eligible for medical benefits. While they were all clearly injured by the impending revocation, the Supreme Court held that the detriment the patients experienced was only *indirect* because the action of the state was against the facility and not directly against them. Since they were only indirectly impacted, they could not claim a deprivation of due process because they were denied a hearing. As the Supreme Court took pains to point out, these patients' rights, if any, were against the hospital and not against the public entity.

This fundamental principle of constitutional law, that indirect deprivations of property rights are nonactionable, has been given wide ranging application in a variety of factual situations.

In *Castaneda v. U.S. Department of Agriculture*, 807 F 2d 1478, 1480 (9th Cir. 1987), a store manager sued the Department of Agriculture because that agency had closed the store where he worked as a result of food stamp violations, causing him to lose his job. He claimed he had the right to a hearing prior to such action being taken. Relying on *O'Bannon*, the Ninth Circuit held that Castaneda had no due process claim because he was only

indirectly adversely affected by the action of the Department of Agriculture.

In *Grove City College v. Bell*, 687 F. 2d 684, 704 (3rd Cir. 1982), a college refused to execute certain federal forms required under statutes administered by the United States Department of Education, causing that agency to revoke all student loans and aid at the college without affording a hearing to the affected students. Citing *O'Bannon*, the court held that the students had no claim for violation of due process because they were only indirectly affected by the Department of Education's action.

In *Nuclear Transport & Storage, Inc. v. United States*, 890 F. 2d 1348, 1354 (6th Cir. 1989), a radioactive waste storage company was impacted when the U.S. Department of Energy began offering free storage facilties [sic] to its customers without granting a hearing prior to taking this action. The court held the company was only indirectly impacted under the reasoning of *O'Bannon* and could therefore state no claim for violation of its due process rights.

There can be no logical distinction drawn between the position of the aggrieved parties in these cases and the position of plaintiff here. The State of California acted to enforce its contractual and statutory rights solely with respect to the prime contractors. While plaintiff has undoubtedly suffered some initial detriment as a result of these prime contractors' withholding of funds, its rights, if any, are against the prime contractor and not these defendants. Any adverse impact which plaintiff has suffered is clearly indirect within the meaning of *O'Bannon*

and its progeny and cannot give rise to a claim of deprivation of due process under the reasoning of those cases.

Based on the facts of this case, as alleged in the complaint, it is apparent that plaintiff is, at best, only indirectly impacted by the action of defendants. It accordingly cannot state a claim upon which any relief can be granted and this action should accordingly be dismissed.

C. The Due Process Clause Does Not Guarantee Plaintiff A Pre-deprivation Hearing In This Case

The gravamen of the principle allegations of the Complaint is that plaintiff was denied a pre-deprivation hearing by defendants in violation of their due process rights (Complaint, 17). This contention presumes that plaintiff necessarily possessed a constitutional right to a pre-deprivation hearing, a presumption that is unwarranted in light of present day law.

The extent to which the due process clause mandates a hearing prior to the deprivation of property rights was carefully considered by the Supreme Court in *Mathews v. Elridge*, 424 U.S. 319, 333 (1976). That Court made clear that the question of whether a pre-deprivation hearing must be afforded consistent with principles of due process was not a black and white matter. Reviewing the cases on this subject, the Court stated:

"These decisions underscore the truism that 'due process, unlike some legal rules, is not a technical conception withh [sic] a fixed content unrelated to time, place and circumstances.' *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests affected.

The Court in *Mathews* pointed out that there were three factors which must be balanced to determine the need, if any, for a predeprivation hearing: 1. the private interest to be affected: 2. the risk of an erroneous deprivation of interest through the procedures used and the probable value of additional procedural safeguards; and 3. the government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. 424 U.S. at pp. 332-335.

Taking these factors in order, we note that the first factor, the private interest to be affected, is unquestionably an interest, as pointed out hereinabove, that is only indirectly impacted by the State of California, inasmuch as the Defendants' action was directed only to the prime contractors and not to plaintiff. Despite some superfluous references in the Complaint to the rights of the prime contractors, plaintiff cannot stand in the shoes of these entities, entities that are not even before this court.

The interest of the State of California in preserving prevailing wage rates in public works contracts is treated more fully elsewhere in this memoramdum. [sic] Suffice it to say at this point that Defendants' purposes in this area, including both the preservation of workers' economic

rights and the prevention of unfair competition among competing contractors, is of compelling importance.

Under existing procedures, a prime contractor is empowered to bring suit against the contracting agency under California Labor Code Section 1773 for all wages and penalties alleged to have been improperly withheld. In view of the efficient processing of cases in the courts in Southern California through the ubiquitous fast track procedures, this constitutes a timely and appropriate means of review of State action in these cases. Such a remedy is consistent with enlightened concepts of due process.

Under the circumstances reflected in the allegations of the complaint, it is apparent that the procedures afforded by Defendants for postdeprivation review by the courts of the validity of the withholding of wages and penalties is not violative of due process.

D. The California Public Works Statutory Scheme, Which Recognizes A Contractual Relationship Between The Awarding Body And The Prime Contractor, Does Not Recognize Privity of Contract With Subcontractors, and, Thus, State Law Does Not Recognize A Right In A Subcontractor To Claim Money Due Under A Contract Between An Awarding Body And A Prime Contractor

The California courts have consistently held that the right of a subcontractor to recover sums it alleges are due for work performed on a public works project is limited to the rights it has under the stop notice provisions of the California Civil Code. *Cal-Pacific Materials Co. v. Redondo*

Beach City School District (1979) 94 Cal.App.3d 652, 655. The *Cal-Pacific* court described the doctrine of privity of contract and explained the remedies available to a subcontractor or materialman:

> "School District contracted with Willens [the prime contractor] and not with Cal-Pacific. Cal-Pacific sold its materials to Western States, Willen's subcontractor, and not to School District. Lack of privity thus precludes recovery by Cal-Pacific unless recovery is permitted because of the stop notice." *Cal-Pacific Materials, supra*, at 656.

In dealing with the prevailing wage statutes, privity of contract is required in order to recover sums "forfeited" by the prime contractor as a result of the failure of that contractor "or by any subcontractor under him or her" to pay the prevailing wage. As described below, the statutory scheme provides only that the prime contractor (or his assignee) has the right to recover the sums withheld *under the contract*.

E. The California Public Works Law Requires That Any Action To Recover Sums Held By An Awarding Agency Must Be Brought By The Contractor Or His Assignee

California Labor Code § 1775 provides that the awarding body must insert in every public works contract a provision which requires the payment of prevailing wages and allows the withholding of wages and penalties in the event of a breach of that provision.

California Labor Code § 1733 provides, *inter alia*:

> "Suit may be brought *by the contractor or his or her assignee* without permission from the state or other authority and is limited to the recovery of the wages and penalties without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract . . . "
> (Emphasis added)

California Labor Code § 1732 provides that the time to bring an action "on the contract" to recover the penalties and wages shall be limited to 90 days and is *the exclusive remedy* of the *contractor or his assignee*. The California Supreme Court has stated that "Labor Code section 1732 provides that a contractor's 'exclusive remedy' for the recovery of penalties assessed under section 1850 shall consist of an action against the awarding body *of his contract* to perform public work under section 1731-1733." *Purdy & Fitzpatrick v. State of California* (1969) 71 Cal.2d 566, 586. (Emphasis added)

Again, the requirement under California law is that the prime contractor is contractually responsible for the payment of the prevailing wage (Labor Code § 1775). Failure of either the prime or his subcontractors to pay the prevailing wage is a breach of the prime contractor's contract with the awarding body. Thus, California law, not surprisingly, requires there must exist privity of contract (or an assignment of the contract right) in order to have standing to recover sums withheld from the contract price for breach of the contract occasioned by the failure of either the contractor or subcontractors under him to pay the prevailing wage. (Labor Code §§ 1730-1733) This

requirement is certainly not unique. Common law contract concepts have always required privity in order to bring an action to enforce a contract.

Even the complaint filed by G&G in this action admits that the sums withheld by the awarding body were withheld from the prime contractor, not G&G. The funds were withheld from amounts which *may* have been due the prime contractors under the *contract*. Had insufficient sums been withheld from the prime contractor, the state agency mandated to enforce the prevailing wage law would have been required to bring an action against the prime contractor (not the subcontractor) to recover the wages.

G&G was not a party to the contract between the awarding body and the prime contractors and has no right to recover sums which might be due under that contract just as there is no provision in the prevailing wage law which would allow the state to recover the wages from the subcontractor. Thus, there was no "taking" from the plaintiff and the actions by the state are not within the "zone of interest" protected by the Fourteenth Amendment. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883, (1990.)

In sum, there is no right of G&G to "entitlement . . . defined by existing rules or understandings that stem from . . . state law." *Russell v. Landrieu*, 621 F.2d 1037, 1040 (9th Cir. 1980). Thus, G&G enjoys no "property interest" in the sums withheld.

F. G&G Does Not Have Standing To Bring This Action To Remedy Rights Under These Public Works Contracts Since It Was Not A Party To Those Contracts

The constitutional provision defining the judicial power of the United States extends the power to cases arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority.

> "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise . . . In both dimensions it is founded in concern about the proper – and properly limited – role of the courts in a democratic society. The constitutional limits on standing eliminate claims in which the plaintiff has failed to make out a case or controversy between himself and the defendant. In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979).

In this case, where the gravamen of G&G's action is an effort to have the provisions of the Labor Code dealing with the withholding of sums from the general or prime contractor declared unconstitutional as applied to plaintiff, there must be a deprivation of some right which inures to a contractor in G&G's position as a result of the actions by the state agency. But, as pointed out above,

G&G has no right to the money withheld by the awarding body and, consequently, can suffer no "injury" attributable to the state or its agencies.

Again, in sum, what G&G's allegations fail to establish is that it has any standing to recover the monies withheld by the awarding body pursuant to the contract between the awarding body and the prime contractor – a contract which does not benefit or relate to G&G. Specifically, G&G asks that this court declare Code §§ 1727, 1729, 1730, 1732, 1733 and 1775 unconstitutional. But pertinent Labor Code sections cited above have no affect on subcontractors performing public works in California. The cited sections constitute the statutory scheme in California designed to enforce the prevailing wage law through withholding from sums due to *prime contractors under the contract* when they are contracting with awarding bodies. Pursuant to § 1727, for instance, "Deficiencies and penalties are to be withheld by the awarding body from sums due *under the contract.*" *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 986. (Emphasis added) Labor Code §§ 1730 provides that the awarding body is to transfer all wages and penalties that have been withheld pursuant to § 1727 (i.e., under the contract) to the Labor Commissioner. Labor Code § 1732 provides the time frame within which the prime contractor (or his assignee) must bring and [sic] action to recover the sums withheld. The action is to be "on the contract for alleged breach thereof in not making the payment" and this suit is "the exclusive remedy" of the contractor or his assignee. Section 1733 provides that the burden of proof is upon the "contractor or his or her assignee to establish his or her right to the wages and penalties withheld."

Under the clear language of the California Prevailing Wage law it is the contractor who bears liability for wage underpayments made by subcontractors. (Labor Code § 1775) This interpretation comports with case law. In *O. G. Sansone v. Department of Transportation* (1976) 55 Cal.App.3d 434, the prime contractor subcontracted a portion of a public works project to a subcontractor, who then subcontracted a portion of his work. Neither subcontractor paid the prevailing wage to its workers. The state withheld payment to the general contractor to cover the underpayment and the Court of Appeal concluded that this was proper:

> "Plaintiffs entered into a contractural [sic] agreement to the effect that they would comply with . . . section 1775 and that they would forfeit to the state $25 per day for each workman paid less than the prevailing wage by either plaintiffs or by their subcontractors, as well as pay to each workman the difference between the prevailing wage and the amount the workman had received. Thus, when [the] subcontractors . . . failed to pay prevailing wages to their workmen, plaintiffs became contractually liable to pay the penalty to the state as well as to pay the wronged workmen the difference in wages." *Id.*, at 462-463.

G. Plaintiff Lacks Standing To Bring This Action On Behalf Of The Prime Contractors Who Are In Privity of Contract With The Awarding Bodies

One of the elements of standing under Article III is that "the plaintiff must establish that the injury can be

fairly traced to the Defendant's challenged conduct and is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United For Separation of Church and State Inc.*, 454 U.S. 464, 472; *LaDuke v. Nelson*, 762 F.2d 1318, 1323 (9th Cir.1985).

In addition to the constitutional requirements of Article III there exist "prudential limitations" which must be met. Here, G&G must assert its own rights and can neither assert nor rely upon the interests of others. *Valley Forge Christian College, supra*, 454 U.S. at 472. In this case, the facts alleged by G&G indicate that the alleged "injury" to itself is "not redressable by a favorable decision," *Valley Forge Christian College, supra*, at 472: *LaDuke, supra*, 762 F.2d at 1323, for even in the unlikely event that this court were to find that the withholding from the prime contractor under the terms of its contract with the awarding body was violative of the Due Process Clause, there is no showing by G&G that the prime contractor would have paid the money over to G&G.

In addition, as the Supreme Court's discussion of third party rights in *Singleton v. Wulff*, 428 U.S. 106 (1976) reveals, G&G must overcome the two-fold prohibition against assertion of third party rights. As the Court noted, such assertion should be the exception and not the rule. *Id.* at 114.

The Supreme Court has more recently addressed the issue of standing to protect the rights of third parties in the case of *Powers v. Ohio*, 499 U.S. 400, (1991). The *Powers* court first restated the long-standing rule: "In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief

premised on the legal rights or interests of third parties." *Id.*, at 412. The Court then relied upon *Singleton, supra,* for the proposition that "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter," *Powers, supra,* at 413, citing *Singleton, supra.* 428 U.S. at 115. The Court noted that in the case before it "there can be no doubt that petitioner will be a motivated, effective advocate for the excluded venirepersons rights." *Powers, supra.* 499 U.S. at 413, and spoke of "this congruence of interests [which] makes it . . . appropriate for the defendant to raise the rights of the [third party]." *Id.*, at 414. The third party "right" which both *Powers* and *Singleton* chose to protect was a constitutionally protected right which the parties held, in common, with all citizens. The right of the juror to serve and the right of the defendant to have that juror serve were not in any way inconsistent.

Here, on the other hand, G&G seeks to represent the interests of prime contractors who have withheld "not less than $135,000.00" from G&G and who, incidentally, have failed to provide G&G with an assignment necessary to recover any of this amount. The fact that these prime contractors did not make such an assignment is instructive inasmuch as there appears to be a lack of a "congruence of interests" between G&G and the prime contractors such that G&G might no [sic] be a "motivated, effective advocate" of the rights of the prime contractors.

H. Even If The Plaintiff Had Standing On Behalf Of The Prime Contractors To Question The Actions of The State In Ordering The Withholding Of Unpaid Wages, The Attack On Constitutional Grounds Must Fail

Even if G&G were allowed to attack the constitutionality of the statute in the stead of the prime contractors, G&G would be in no better position than those it would then represent. There is little doubt that the prime contractors who entered into the contracts with the awarding bodies have benefitted from the fact that they did business with the State under the terms of the Act. These contractors would now be estopped to bring an action to test the constitutionality of the statutory scheme which allows the awarding body to withhold sums due under the contract. The admonition of the U.S. Supreme Court in the case of *Fahey v. Mallonee,* 332 U.S. 245, 255 (1947) would be appropriate:

> "It is an elementary rule of constituional [sic] law that one may not retain the benefits of the Act while attacking the constitutionality of one of its important conditions. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.'"

See also *Foster v. Superior Court,* 26 Cal.App.2d 230, 234, *Tracy v. McIntyre,* 29 Cal.App.2d 145, and *Madonna v. State of California,* 151 Cal.App.2d 836.

I. The Individual Defendants Are Immune From Suit In This Action

Up until recently plaintiff has forborn from suing agencies of the State of California in this case and has named solely the following public officials: Victoria Bradshaw, as the Labor Commissioner, Lloyd W. Aubry, Jr., as the Director of the Department of Industrial Relations, Daniel Dellarocca, as a Deputy Labor Commissioner, Roger Miller, as a Deputy Labor Commissioner, and Rosa Frazier, as a Deputy Labor Commissioner.

It is well settled that a qualified immunity shields public officials whose conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person must have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982): *Anderson v. Creighton*, 483 U.S. 635, 639-640, 107 S.Ct. 3034 (1987); *Erickson v. U.S.*, 976 F. 2d 1299, 1301 (9th Cir. 1992). It is apparent from those cases that the determination of whether qualified immunity exists does not take place in a vacuum. "[W]hether an official protected by qualifies immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken . . . " *Anderson v. Creighton* at 639.

In determining whether a 'clearly established right' existed, the courts must "survey the legal landscape" as it existed at the time of the alleged violation. *Figueroa v. U.S.*, 7 F.3d 1405, 1409 (9th Cir. 1993); *Wood v. Ostrander*, 879 F.2d 583, 591 (9th Cir. 1989), certiorari denied 493 U.S. 938.

The sole allegation against these officials in the original complaint was that they issued certain notices to awarding bodies contracting with the prime contractors regarding the failure to pay prevailing wage rates on the projects involved, doing so without affording plaintiff or its prime contractors a hearing (Complaint, 13 and 14).

Following service and analysis of the previous Motion to Dismiss, plaintiff amended its Complaint, as discussed hereinabove, in an attempt to overcome the defense of qualified immunity. Specifically, it has added new Paragraph 27, which provides as follows:

> "27. By the acts and conduct set forth above, Defendants have deprived Plaintiff of its property without due process of law in contravention of Section 1 of the Fourteenth Amendment to the U.S. Constitution. Plaintiff is informed and believes and thereupon alleges that Defendants so deprived Plaintiff with knowledge that their actions were in violation of the U.S. Constitution. A Reasonable person with knowledge of the facts and information known and available to Defendants would know that the actions as hereinabove alleged were unconstitutional."

Can these conclusionary allegations made on information and belief defeat the defense of qualified immunity in the absence of a showing that some "clearly established" right was violated? Clearly they cannot. The discussion in *Erickson v. U.S., supra,* is instructive on this point:

> "We have divided the qualified immunity analysis into three inquiries:

(1) the identification of the specific right allegely [sic] violated: (2) the determination of whether that right was so "clearly established" as to alert a reasonable officer to its constitutional parameters: and (3) the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue."

* * *

"As the Supreme Court has explained herein, if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to 'objective legal reasonableness' that is the touchstone of Harlow [v. Fitzgerald]. Plaintiffs would be able to convert the rule of qualified immunity into a rule of mutually unqualified liability simply by alleging violation of extremely abstract rights . . . It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Anderson v. Creighton, 483 U.S. 635, 639-40, 107 S. Ct. 3034, 3038-39, 97 L.Ed. 2523 (1987). Even if Erickson had identified the rights involved with requisite specifity [sic], however, we are aware of no authority that clearly establishes a constitutional right against the kind of official conduct involved in this case." *Erickson v. U.S.* at 1301.

Plaintiff has not cited and cannot cite any case that stands for the proposition that Sections 1727-1731, 1774, 1775, 1777.5 or 1815 are unconstitutional because no court

has so held. Officials who implement and enforce these provisions like the individual defendants named herein, have the right to assume these provisions are valid until some court tells them otherwise.

While it has been held not to be necessary for the conduct in question to be previously declared unconstitutional to be found inimical to "clearly established law," the unlawfulness of the public official must have been apparent in light of preexisting law. *Anderson v. Creighton*, supra, 483 U.S. at 640.

According to the allegations of the Complaint, the individual defendants merely issued certain notices to awarding bodies who had contracted with the prime contractors regarding the failure to pay prevailing wages without giving a hearing to plaintiff (Complaint, Paragraph 16).

To argue that actions such as these are outside the scope of qualified immunity is to lose sight of the fundamental policy underlying this well-established doctrine. "The general rule of qualified immmunity [sic] is intended to provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages'. *Davis* 468 U.S. at 195. Where that rule is applicable, officials can know that they will not be held personally liable as long as their actions are reasonable in light of current American law. That security would be utterly defeated if officials were unable to determine whether they were protected by the rule without entangling themselves in the vagaries of English and American common law." *Anderson v. Creighton* at p. 646.

In fact the Supreme Court has gone so far as to declare that the qualified immunity defense "provides ample protection to all but the plainly incompetent or those who knowingly violate the law". *Malley v. Briggs*, 475 U.S. 335, 341, (1968).

How can plaintiff contend that these officers have violated "clearly established statutory or constitutional rights of which a reasonable person must have known", when the sole and express purpose of this lawsuit is to persuade this court to declare, for the first time, that a due process right to a predeprivation hearing exists under the circumstances alleged in the complaint? This is after all, an area of the law where, as the Supreme Court tells us, concepts are "flexible" and vary depending on the particular fact situation confronting the court. *Morrissey v. Brewer, supra*, 408 U.S. at 481.

Even if plaintiff were to prevail in its aforementioned constitutionality argument, a position Defendants vigorously dispute, it is apparent that these individual Defendants were only performing their legislatively assigned duties in enforcing and implementing provisions of the California Labor Code and could have no reason to believe that these provisions were unconstitutional in any respect. Despite its conclusionary allegations to the contrary, the Complaint in this suit is clearly defective in that it fails to show a knowing violation by these individual defendants of a "clearly established statutory or constitutional right," since whatever their state of mind at the time of the events, the so called "right" plaintiff urges was not "clearly established."

J. This Is Not An Appropriate Case for Injunctive Relief Because Plaintiff Has an Adequate Remedy At Law

Plaintiff attempts to allege a basis for injunctive relief, stating in conclusionary terms that it has suffered irreparable injury and has no adequate remedy at law (Complaint, Paragraphs 33-34). But the specific allegations of the Complaint contradict these general statements, showing that what is in dispute here is no more than a sum of money which has been withheld from plaintiff by the prime contractors due to the actions of defendants in posting certain notices (Complaint, Paragraphs 16, 18-19).

It is significant that the prayer requests not simply status quo relief, but a mandatory injunction preventing defendants "from enforcing, or threatening to enforce, the provisions of California Labor Code && [sic] 1727, 1729, 1775 or 1776 against Plaintiff, or any other person, with regard to any 'public works' project, including, without limitation, imposing, or threatening to impose, civil penalties against any person, including Plaintiff; issuing Notices to Withhold with regard to Plaintiff and/or any other person . . . " Plaintiff is asking for nothing less than a mandatory injunction to accomplish a complete shutdown of the statutory scheme with respect to both itself and all other persons.

To obtain injunctive relief in the federal courts, a plaintiff must demonstrate that his remedy at law is inadequate. *Stanley v. University of Southern California*, 13 F. 3d 1313, 1320 (9th Cir. 1994). It must also demonstrate

that "it will be exposed to some significant risk of irreparable injury." *Associated General Contracting Co. v. Coalition for Economic Equity*, 950 F. 2d 1401, 1410 (9th Cir. 1991) certiorari denied 112 S. Ct. 1671; *Caribbean Marine Service Co. v. Baldridge*, 844 F. 2d 688 (9th Cir. 1988).

There is nothing about this case as disclosed in the allegations of the Complaint that separates it from a garden variety action for monetary damages or justifies the disfavored remedy of a mandatory injunction.

III. CONCLUSION

The withholding of wages and penalties under the Prevailing Wage Rate Act of which the plaintiffs complain was solely and totally from sums due the prime contractors, such withholding having been made as a result of a provision in the contract between the awarding body and the prime contractors. Plaintiffs are not in privity of contract and cannot complain of the actions taken under the contract. Further, even if the plaintiffs did have standing to bring this action on behalf of the prime contractors, the withholding was not a violation of due process because plaintiff was only indirectly impacted by this action. Plaintiff has also failed to overcome the presumption of immunity of public officials inasmuch as it has failed to allege that the individual Defendants knowingly violated "clearly established" legal or constitutional rights in withholding funds from the prime contractors. Finally, plaintiff has failed to state a claim for injunctive

relief because it cannot show that it does not have an adequate remedy at law in money damages.

Dated: September 19, 1995

Respectfully submitted,

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC.,) Case No.
) 95-4839 R (BQRx)
Plaintiff,)
) [Proposed] ORDER
vs.)
)
VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

The motion of defendants to dismiss plaintiff's complaint was regularly heard on the above date and time. Appearing as attorneys were Thomas S. Kerrigan for defendants, and Stephen A. Seideman for plaintiff.

Having considered all papers filed in this action, and the argument of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED that plaintiff's complaint be dismissed in its entirety.

DATED: _____

_____
MANUEL REAL
U. S. District Court Judge

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	CIVIL NO. 95-4839 R PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT DATE: 11-06-1995 TIME: 10:00 a.m. DEPT: Courtroom 8, U.S.D.C. 312 N. Spring St. Los Angeles, CA 90012

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

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I. INTRODUCTION

Plaintiff contends that the provisions of the California Labor Code which authorize the California Division of Labor Standards Enforcement ("DLSE") to assess penalties and forfeitures, and order money withheld, on account of alleged violations without notice or hearing is unconstitutional. Plaintiff further alleges that the law is unconstitutional as applied to Plaintiff. The law and procedures in question relate to the prevailing wage requirements in the California Labor Code.

Defendants are DLSE, and officials of DLSE. Plaintiff seeks to enjoin Defendants from enforcing the unconstitutional statutes and/or undertaking unconstitutional enforcement action. Plaintiff also seeks declaratory relief that such statutes, and enforcement actions, are unconstitutional and invalid.

Plaintiff filed this lawsuit previously. At that time, DLSE was withholding more than $230,000 of Plaintiff's money. On the eve of Plaintiff's summary judgment motion, DLSE offered to release all but $30,000 of the funds if Plaintiff would dismiss the lawsuit. Plaintiff agreed to the settlement because it needed the money, and with the express proviso that the dismissal was without prejudice and that the lawsuit could be re-filed if further action was taken against Plaintiff.

Thereafter, DLSE assessed penalties against Plaintiff for purportedly not responding in a timely manner to a request by DLSE for copies of payroll reports. Apparently, the purported written request was sent to a previous address of Plaintiff. DLSE has refused to provide any information with regard to the factual basis for the assessment of penalties, or the method or calculation thereof. DLSE has taken other action in furtherance of its pattern of harassment of Plaintiff. Plaintiff filed this lawsuit to seek declaratory and injunctive relief with regard to the unconstitutional labor laws, and unconstitutional actions of DLSE.

The assertion in the moving papers that Plaintiff violated the prevailing wage laws is disputed as false and meritless. In fact, Plaintiff contends that the assertion of

penalties is not only meritless, but frivolous. Nevertheless, the issue in this case is not whether Plaintiff violated the labor laws, or whether the State has authority to require payment of prevailing wages. The issue in this case is that the enforcement procedures are unconstitutional, as they do not comply with the due process requirements for notice and hearing.

Defendants filed a similar motion to dismiss in the prior case which was denied.

II. PLAINTIFF'S COMPLAINT DID NOT CONTEST THE STATE'S AUTHORITY TO ESTABLISH PREVAILING WAGE REQUIREMENTS

Defendants assert that the State has authority to establish prevailing wage requirements. *See, Atkin v. Kansas*, 191 U.S. 207 (1903). Plaintiff's complaint does not dispute the State's authority to establish prevailing wage requirements. Plaintiff asserts that such requirements must be enforced in accordance with the due process requirements of the Constitution.

III. THIS CASE INVOLVES REGULATORY, NOT PROPRIETARY CONDUCT OF THE STATE

It should be noted that this case involves state officials acting in a regulatory, and not proprietary manner. The question of the application of due process to proprietary conduct of the State is not presented by this case, and need not be addressed by the Court. The courts have explained that there is sometimes a distinction in the restrictions placed on State conduct depending on

whether the State is acting in its regulatory capacity, or in proprietary manner. *See, Building Trades v. Associated Builders and Contractors* 507 U.S. ___, 122 L.Ed.2d 565, 113 S.Ct. 1190 (1993). The State acts in a proprietary manner when, as an owner of property, it conducts business as would any private owner of property, with no interest in setting policy. *Id.* at 576, 577. This case involves conduct by Defendants which is wholly regulatory. To wit, the imposition of penalties for alleged violations of the state labor code. The mandates of the due process clause of the United States Constitution are fully applicable.

IV. THE NOTICE TO WITHHOLD CAUSES A DEPRIVATION OF A PROPERTY INTEREST

The issuance of a notice to withhold based on alleged violations by Plaintiff deprives Plaintiff of a property interest under the due process clause. California Labor Code §1729 provides that if an awarding body withholds money from a prime contractor due to alleged violations of a subcontractor, the prime contractor may withhold money from the subcontractor. Therefore, whether Plaintiff acts as a prime contractor, or subcontractor, the issuance of a notice to withhold results in the deprivation of money due for work performed.

In *Bailey v. Secretary of the United States Department of Labor* 810 F.Supp. 261 (D. Alaska 1993) the court held that withholding money from a contractor due to alleged prevailing wage violations was a deprivation of property. The court also so held in *Ames Const. v. Dole* 727 F.Supp. 502 (D. Minn. 1989), wherein the court stated: "The court finds that the government's suspension of payments to

Ames does constitute a deprivation of property subject to the due process clause of the Fifth Amendment."

In *Fuentes v. Shevin* 407 U.S. 67, 85; 32 L.Ed. 556, 572; 92 S.Ct. 1983 (1972), the party did not hold legal title to the goods seized, but merely had a possessory interest. The court held that "the interest in continued possession and use of the goods" was a property interest protected by the due process clause. *Fuentes supra* at 86. The court stated that the Fourteenth Amendment "has been read broadly to extend protection to any significant property interest." *Id.* at 86. In *Goldberg v. Kelly* 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970) the court held that the right to receive government welfare payments was a property interest protected by the due process clause. *United States v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 492, 126 L.Ed.2d 490 (1993) involved the non-final seizure of real property which was rented to tenants. The court stated that the government "contends that the tangible effect of the seizure was limited to taking the $900 a month he was due in rent. But even if this were the only deprivation at issue, it would not render the loss insignificant or unworthy of due process protection." *Daniel supra.* at 501. The court in *Daniel* explained that "individual freedom finds tangible expression in property rights." *Id.* at 505. Certainly, the right to receive contract payments for work performed is a property interest protected by the due process clause.

V. DEFENDANTS' CONTENTION THAT PLAINTIFF'S INJURIES CONSIST SOLELY OF NON-ACTIONABLE INDIRECT AVERSE EFFECTS OF GOVERNMENTAL ACTION IS WITHOUT MERIT

Defendants assert that under *O'Bannon v. Town Court Nursing Center* 447 U.S. 773; 100 S.Ct. 2467 (1980) Plaintiff cannot assert a claim. Defendants' contention is completely without merit. *O'Bannon* does not bar Plaintiff's claim. To the contrary, *O'Bannon* expressly makes clear that Plaintiff may assert a claim. Moreover, the First Amended Complaint alleges that Plaintiff has acted, and intends to act, as a prime contractor, as well as a subcontractor (Compl. ¶¶ 14-15).

O'Bannon concerned a nursing home which had been certified to provide care for patients receiving Medicare/Medicaid. The government revoked the certification pursuant to proceedings instituted against the nursing home (Town Court). There was no dispute that due process was provided to Town Court. Certain patients of the nursing home contended that they had a separate right to a due process hearing before the certification could be revoked. The court rejected the argument of said patients. The court analogized the situation to that if a utility turned off the electrical power to the nursing home. Although due process may require a public utility to give prior notice to the nursing home, such requirement would not extend to each patient in the nursing home. The Supreme Court expressly distinguished a situation where governmental action against a person is intended or expected to affect a third person who is considered the responsible party, such as in the present case. *Id.* at 789, fn. 22.

A notice to withhold asserted because of alleged violations by a subcontractor is precisely the type of situation distinguished by the court in *O'Bannon*. The statutory scheme provides that upon the assertion of forfeitures and penalties on account of a subcontractor, the subcontractor's money is withheld (Cal. Labor Code § 1729). The deprivation of such money as the result of a notice to withhold alleging violations by the subcontractor is not a mere incidental effect of the governmental action. To the contrary, it is the expected and intended effect.

In *O'Bannon*, the court explained that it was significant that the nursing home had a due process right to contest the decertification, and was the party with the greatest interest in doing so. *Id.* at 789 fn. 22; 797. Under California Labor Code, neither the prime contractor or subcontractor is entitled to due process. Moreover, if the subcontractor's money is withheld, the prime contractor would have no financial incentive to contest the action in any event. The concurring opinion further explained that in *O'Bannon* the underlying source of the benefit was removed, as opposed to specific action against specific persons. The court analogized the situation to that if the government eliminated an entitlement program entirely. The court explained that each individual is not entitled to a due process hearing when the underlying source of a benefit is removed, but such a right does arise when action is taken against a specific person. The notice to withhold procedure involves action taken against a specific person. The court further explained that a decertification affected all patients equally, in a non-discriminatory manner. The notice to withhold procedure discriminates

as to the particular person subjected to the forfeitures and penalties. Another fact asserted by the court in support of the decision was that the patients were not alleged to have been responsible for the decertification. However, the issuance of a notice to withhold as to a subcontractor is based on purported violations by the subcontractor.

The holding in *O'Bannon* is clearly not applicable to this case. Moreover, the court in *O'Bannon* expressly distinguished the situation presented here from its holding.

Defendants also cite three Court of Appeal cases which relied on *O'Bannon*. However, those cases are equally inapplicable to the present case.

In *Castaneda v. U. S. Department of Agriculture* 807 F.2d 1478 (9th Cir. 1987) the government revoked the right of a store to accept food stamps. Thereafter, the store manager was fired. The store manager sued contending that he was entitled to a due process hearing with regard to the revocation (there was no dispute that the store received due process).The court held that employees of the store had no due process right, with regard to the revocation, separate and distinct from the store. The court held that the governmental action did not deprive Castaneda of any property interest. The court expressly stated that the result would be different if the governmental action against the store targeted Castaneda in some manner. The decision in Castaneda is inapplicable for the same reason as set forth above with regard to *O'Bannon*.

In *Grove City College v. Bell* 687 F.2d 684 (3d. Cir. 1982) the court held that any college with students receiving federal student aid was required to comply with federal anti-discrimination laws. There was no dispute that the

college received due process. However, individual students at the college receiving student aid contended that they had a separate right to a due process hearing. The court held that there was no deprivation of property as to the students since their entitlement was to student aid at a qualified college. The students remained entitled to such benefits. The issue of whether the college complied with federal antidiscrimination laws was a matter between the college and the government. The students had no separate right to a hearing on the issue of whether the college complied with anti-discrimination laws. The case is inapplicable to the present case. In this case, no person is afforded due process rights with regard to the withholding. Moreover, the person alleged to have committed the violations resulting in penalties and forfeitures is entitled to a due process hearing.

In *Nuclear Transport v. United States* 890 F.2d 1348 (6th Cir. 1989) the government licensed the plaintiff to store hazardous material. The government then offered its own storage facilities in competition with plaintiff. Plaintiff contended that it was deprived of property by way of the reduction in the value of its license. The court held that the license was non-exclusive, and there was no promise or agreement that the government would not offer competing facilities. Therefore, there had been no deprivation of property. The case is completely inapplicable to this action.

Defendants argument that no due process rights accrue to a person subjected to penalties and forfeitures due to purported violations of labor law is without merit. The legal authorities cited by Defendants do not support their position.

VI. DEFENDANTS' CONTENTION THAT THE DUE PROCESS CLAUSE DOES NOT GUARANTEE A PRE-DEPRIVATION HEARING IS IMMATERIAL, AND INCORRECT

Defendants assert that the due process clause does not provide a right to a pre-deprivation hearing. With regard to a motion to dismiss, the argument is both incorrect and immaterial. In the limited circumstances where a pre-deprivation hearing is not required by due process, a prompt post-deprivation hearing is required. The California Labor Law provides for neither a predeprivation hearing, or a prompt post-deprivation hearing. Therefore, the law, and Defendants' actions, are unconstitutional under any circumstances.

Defendants' reliance on *Matthews v. Elridge* 424 U.S. 319 (1976) to support its contention that no pre-deprivation hearing is required is misplaced. *Matthews* did not involve the imposition of penalties for alleged wrongdoing. Moreover, in *Matthews*, the procedure under review involved substantial due process protections. The case concerned termination of disability benefits. The court distinguished determinations based on credibility of witnesses, and factual disputes. The court explained that disability benefits were mostly based on medical records provided by generally objective and verifiable reports of doctors. The court explained that where factual disputes involving issues of credibility are involved, a more formal pre-deprivation hearing is required.

In *Matthews*, there was an informal pre-deprivation hearing which included an explanation of the basis for the proposed termination, and an opportunity to present

contrary evidence. In the present case, there is no procedure for any pre-deprivation hearing whatsoever. In fact, notices to withhold based on penalties and forfeitures are issued without any prior notice or explanation of the basis therefor. Moreover, in *Matthews*, there was an extensive procedure for post-deprivation hearings to contest the determination. California Labor Law provides for no such prompt post-deprivation hearing procedure. *Matthews* does not support the contention that there is no right to a pre-deprivation hearing with regard to assessment of penalties and forfeitures by Defendants.

The right to a pre-deprivation hearing is well established. *See, Fuentes v. Shevin* 407 U.S. 67, 85; 32 L.Ed. 556, 572; 92 S.Ct. 1983 (1972); *Sniadach v. Family Finance Corp.* 395 U.S. 337; 23 L.Ed.2d 349; 89 S.Ct. 1820 (1969). The right to such hearing was recently reaffirmed in *United States v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), wherein the court stated "The right to prior notice and a hearing is central to the Constitution's command of due process." In *Bailey v. Secretary of United States Department of Labor* 810 F.Supp. 261 (D. Alaska 1993) the court held that pre-deprivation hearing was required before money could be withheld due to alleged prevailing wage violations. A pre-deprivation hearing may be dispensed with only in extraordinary circumstances *Fuentes supra, Sniadach sup:* "To establish exigent circumstances, the government must show that less restrictive measures . . . would not suffice." *James Daniel Good supra* at 505. The requirement of neutral decision making "is of particular importance . . . where the government has direct pecuniary interest in the outcome of the proceeding." *Id.* at 502.

Even where extraordinary circumstances justify dispensing with a pre-deprivation hearing, a prompt post-deprivation hearing must be provided. *Federal Deposit Insurance Corporation v. Mallen* 486 U.S. 230, 242, 11 L.Ed.2d 265; 108 S.Ct. 1780 (1988). In *James Daniel Good supra*, the court held a post-seizure right to trial was insufficient to comply with the requirements of due process.

Defendants' contention that there is no right to pre-deprivation hearing is without merit. Moreover, the issue is immaterial, since a prompt, post-deprivation hearing would be required in any event. Since neither is provided for under the Labor Code, the motion to dismiss should be denied.

VII. THE FACT THAT CALIFORNIA LABOR CODE DOES NOT PROVIDE A SUBCONTRACTOR WITH THE RIGHT TO CONTEST FORFEITURES OR PENALTIES DOES NOT SUPPORT DEFENDANTS' MOTION TO DISMISS

Defendants explain that under California law only a prime contractor may seek recovery of money withheld on account of a notice to withhold issued by DLSE. Defendants' assertion merely highlights the unconstitutionality of the procedure. The DLSE may issue a notice to withhold asserting penalties and forfeitures on account of purported labor law violations by a subcontractor. The Labor Code provides that payment is then withheld from both the prime contractor, and subcontractor. Thus, the subcontractor bears the financial burden of the withholding. However, as Defendants explain, the subcontractor has no right, at any time, to contest the penalties or

forfeitures. The denial of due process is blatant, and indisputable.

VIII. PLAINTIFF HAS STANDING TO BRING THIS ACTION

The allegations of the complaint established that Plaintiff has standing to bring the action. Plaintiff has worked both as a subcontractor and prime contractor on various public works projects which are subject to the prevailing wage requirements of the California Labor Code. *See,* Plaintiff's First Amended Complaint (hereinafter "Compl."), paragraph 14. Plaintiff intends to continue performing work on public works projects in California as a subcontractor and prime contractor (Compl. ¶ 15). Defendants assessed penalties and issued notices to withhold, on an account of alleged violations by Plaintiff (Compl. ¶ 16). As a result, there is presently in excess of $135,000 in money withheld from Plaintiff (Compl. ¶¶ 18-21). The notices to withhold were intended to, and did, cause Plaintiff to be deprived of its money (Compl. ¶ 26).

In *Associated General Contractors v. Coalition for Economic Equity* 950 F.2d. 1401 (9th Cir. 1991) the court reaffirmed the broad scope of standing to contest invalid laws and government action. The court held that an association of contractors had standing to contest the validity of a municipal ordinance providing bid preferences to minority business enterprises. The court held that standing to determine the validity of executive or legislative action exits [sic] where a party has sustained, or is in immediate danger of sustaining, injury from the action.

Plaintiff has alleged injury from the unconstitutional procedure for assessment and withholding of penalties and forfeitures. Moreover, since Plaintiff will continue performing work on public works projects in California, Plaintiff is in immediate danger of further injury. Plaintiff has standing, just as the association of contractors has standing to challenge the ordinance in the above cited case. In *Flast v. Cohen* 392 U.S. 83 (1968) the court held that plaintiff's status as a tax payer was sufficient to confer standing to attack a statute provided for the payment of government money to a religious school. In *Warth v. Selvin* 422 U.S. 490 (1975), the court held plaintiff had standing to attack the constitutionality of exclusionary zoning. The court explained to have standing a party need merely only show some injury due to the governmental action. Moreover, the court stated so long as the plaintiff suffered some injury, the plaintiff may invoke the rights of others. *Warth supra* at 501. The court further explained that a third party has standing where its injury resulted indirectly in the deprivation of the rights of another. *Id.* at 504-505. In *Salla v. County of Monroe* 64 A.D.2d 437, 409 N.Y.S.2d 903 (1970) the court whether non-resident employees had standing to contest a labor code provision which required the use of resident labor on public works projects. The court held that the fact that the employees had no legal relationship with the awarding body for the contracts was irrelevant. The court held that the employees had standing to contest the statute.

Plaintiff has suffered, and continues to suffer on an ongoing basis, substantial injury due to the unconstitutional enforcement of the prevailing wage law. Clearly,

Plaintiff has standing to assert the unconstitutionality of the statutes, and their application.

IX. DEFENDANTS' ARGUMENT WITH REGARD TO IMMUNITY IS INCORRECT AND IMMATERIAL

Defendants argue that the individual Defendants have immunity from this litigation. The law regarding immunity cited by Defendants relates to actions for damages. Defendants do not have immunity from actions seeking declaratory and injunctive relief. All the cases cited by Defendants relate to actions for damages.

Moreover, even as to actions for damages the immunity is qualified. There is no immunity where Defendants should have known that their conduct was unconstitutional. Plaintiff specifically alleged in paragraph 27 of the First Amended Complaint that Defendants knew, and should have known, that their actions were in violation of Section 1 of the Fourteenth Amended [sic] to United States Constitution. Thus, even as to action for damages, Defendants would not be entitled to dismissal at the pleading stage.

Furthermore, the Court may take judicial notice of the prior lawsuit filed by Plaintiff alleging Defendants' unconstitutional action. The lawsuit was dismissed without prejudice pursuant to an agreement which specifically provided that it could be re-filed if Defendants took further action against Plaintiff. The previous lawsuit, and Plaintiff's motion for summary judgment therein, established that Defendants knew, and should have known, that their actions were unconstitutional.

X. PLAINTIFF IS NOT ESTOPPED FROM BRINGING THIS ACTION

Defendants argue that Plaintiff stands in the shoes of the prime contractors. Defendants contend that the prime contractors are estopped to bring such an action because they did business with the State under the terms of the act. Defendants argue that since Plaintiff stands in the shoes of the prime contractor, the estoppel applies to Plaintiff. However, Plaintiff does not stand [sic] the shoes of the prime contractors. Plaintiff has standing in its own right to bring this action. *See*, part II above. Therefore, the argument that the prime contractors would be estopped to bring such an action is immaterial. Plaintiff is not estopped to bring the action by any conduct of the prime contractors. Thus, Defendants' contention regarding estoppel is without merit.

Even assuming arguendo that an estoppel could apply under some circumstances, it would apply only to a facial attack on the validity of the statute. An estoppel could not apply to Plaintiff's claim for unconstitutional application by Defendants. Defendants contend that the prime contractor somehow accepted benefits under the statute, and therefore cannot challenge the constitutionality of the statute. Even assuming arguendo this were correct, no one accepted unconstitutional enforcement procedures by Defendants which are not specified by statute. The issue of an estoppel, at most, could only relate to Plaintiff's attack on the facial validity of the statute providing for imposition of penalties. Plaintiff could proceed with its action for unconstitutional application of the statue [sic] under any circumstance.

Furthermore, the issue of estoppel cannot apply to prospective relief sought by Plaintiff. Plaintiff seeks to have the statutes (and Defendants' conduct) declared unconstitutional for future projects. The argument of estoppel cannot apply to such prospective relief. Plaintiff cannot be estopped by conduct not yet undertaken.

In any event, there is no estoppel established by the pleadings under any circumstances whatsoever. No benefit was received under the prevailing wage statutes. The prevailing wage statutes are merely statutory requirements imposed upon contractors. *See, Lusardi Construction v. Aubry* 1 Cal. 4th 976 (1992). A contractor (or subcontractor) receives no benefit whatsoever from the prevailing wage statutes. Even assuming arguendo there had been some benefit, receiving a benefit under an act does not estop a party from challenging a separable part of the act. *Thompson v. Consolidated Gas* 300 U.S. 55 (1936). In holding that acceptance of benefits under one portion of an action does not estop a party challenge another separable part, the court stated the following with regard to the benefits received, "those benefits result incidentally from the enactment of other provisions of the Act, the constitutionality of which is not questioned, and which seemed clearly separable from the sections here challenged." *Id.* at 81. *See, also, Buck v. Kuikendall* 267 U.S. 307 (1925).

Assuming arguendo that Plaintiff had received some benefit under the Act, the provision allowing penalties to be imposed by the Labor Commissioner without notice and hearing is clearly separable and subject to challenge.

Defendant cites the case of *Fahey v. Mallone* 332 U.S. 245 (1947). *Fahey* is not applicable. *Fahey* involved an action by a savings and loan association. The association was created pursuant to statute. The association challenged the government's right under the statute to regulate the activities of the association. The court explained that it would be unacceptable to allow an association to function as a chartered savings and loan under the Act, and then challenge the right of the government to regulate its activities as provided for under the Act. The court held that the portions of the Act challenged were not severable from that portion under which the association had obtained benefits.

The portion of the opinion quoted by Defendants failed to include the sentences immediately thereafter that explained the court's decision. The court stated:

> "In the name and right of the association it is now being asked that the Act under which it has its existence be struck down in important particulars, *hardly severable from those provision which grant its right to exist* . . . if it can hold the charter that it obtained under this Act and strike down the provision for terminating its powers or conserving its assets, it may perpetually go on, notwithstanding any abuses with which its management may perpetrate."

Id. at 255-256.

In *Fahey,* the court clearly held that the provisions of the Act being challenged were not severable from the portion granting the association the benefit of its existence. To the extent Plaintiff received any benefits from

the Act as here, the provisions providing for the imposition of penalties without notice of hearing are clearly severable. In this regard, it should be noted that Plaintiff does not contest the ability of Defendants to enforce the prevailing wage law by appropriate means, such as filing a lawsuit or making a claim on a contractor's bond. Also, it should be noted that the court in *Fahey* quotes from *Ashwander v. Tennessee Valley Authority* 297 U.S. 288 (1936) with regard to this statement that the court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. In *Ashwander*, the court held that plaintiff was not estopped from attacking the constitutionality of the statute. In *Ashwander*, the court held that the previous acceptance of benefits under the Act was different from the subject of the constitutional challenge. Hence, no estoppel was applicable.

Furthermore, in *Fahey* the plaintiff attacked the right of the agency to impose its regulatory authority. The issue as to which estoppel was applicable went to the substance of the authority to regulate, not the procedural requirements of due process. The plaintiff in *Fahey* also raised an issue of procedural due process with regard to an administrative hearing provided for under the Act. The court did not hold that the plaintiff was estopped to assert the claims. of procedural due process. Plaintiff does not contest the right to impose prevailing wage agreements. Plaintiff merely asserts a right to procedural due process.

The other cases cited by Defendants are also inapplicable. Defendants cite *Foster v. Superior Court* 26 Cal.App.2d 230, 79 P.2d 144, (1938); *Madonna v. State of*

California 151 Cal.App.2d 836 (1957); and *Tracy v. McIntyre* 29 Cal.App.2d 145, 84 P.2d 526 (1938). *Foster* and *Tracy* were cases in which the appellant had brought motions under a statute allowing the court to determine the attorneys fees owed to a previous attorney of record. After a disappointing result, the party who brought the motion challenged the constitutionality of the statute. In *Madonna*, the appellant brought a statutory lawsuit to recover wages and penalties under Labor Code § 1733. The appellant lost the case on the basis that his action was not timely filed. The appellant then challenged the constitutionality of § 1733. In each of the cases the court held that the party was estopped from challenging the statute under which it had brought its action. These cases stand for the proposition that a party may not bring an action under a statute, and then after losing the case, seek to avoid the result by attacking the constitutionality of the statute. The cases are not applicable to this action. Plaintiff does not seek to avoid the results of any previous action.

The issue of estoppel in an action similar to this case was addressed in the case of *Salla v. County of Monroe* 64 A.D.2d 437, 409 N.Y.S.2d 903 (1978). In *Salla*, a contractor brought an action challenging the constitutionality of a statute requiring contractors on public works to utilize resident labor. Defendants argued that the contractor was estopped from challenging the constitutionality of the statute by failing to object until after commencement of construction, and by making substantial efforts to comply with the law. The court stated:

> "We do not deem Lisbon's acceptance of the construction contract to be a waiver of its

> constitutional rights because a public contract should not be conditioned on a waiver of constitutional rights. Nor do we believe that Lisbon's attempts to comply with the statute in order to avoid breaching the construction contract constitute a waiver of the right to challenge its constitutionality."

Id. at 906-907 [Citations omitted].

See, also, Ames Construction v. Dole 727 F. Supp. 502 (D.C. Minn. 1989) wherein the court held that the statutorily mandated inclusion in a contract of provisions relating to withholding for alleged prevailing wage violations does not restrict the contractor's right to challenge the constitutionality of the statutes.

Plaintiff cannot be estopped by any conduct of the prime contractor. Plaintiff cannot be estopped from asserting the unconstitutional application of the law by Defendants. Plaintiff cannot be estopped to seek prospective relief. No estoppel based on any conduct by Plaintiff has been established. Plaintiff did not receive any benefits from, or under, the prevailing wage statutes. Even assuming arguendo Plaintiff had received any benefits, the provisions allowing for the imposition of penalties without a hearing, are severable. Accordingly, Plaintiff's Complaint should not be dismissed.

XI. DEFENDANTS' CONTENTION THAT PLAINTIFF IS NOT ENTITLED TO INJUNCTIVE RELIEF BECAUSE PLAINTIFF HAS AN ADEQUATE REMEDY AT LAW IS WITHOUT MERIT

Plaintiff has alleged facts establishing that Plaintiff does not have an adequate remedy at law (Compl.

¶¶ 33-34). Plaintiff alleged that Plaintiff has suffered, and will continue to suffer, irreparable injury if Defendants are not enjoined and that Plaintiff will be deprived of its property without due process of law, could be liable for civil penalties and back wage forfeitures without a due process hearing, will be required to expend time and money to vindicate its rights, and will be exposed to unfavorable publicity which will injure Plaintiff's reputation as a reputable construction firm resulting in loss of business (Compl. ¶ 33). Plaintiff further alleged that it does not have an adequate remedy at law because the pecuniary damages which it might suffer are difficult or impossible to fully ascertain, the irreparable injury to Plaintiff's reputation cannot be fully compensated by money damages, and Defendants' conduct is unconstitutional and therefore subject to injunctive relief. The pleadings must be accepted as true with regard to a motion to dismiss. Therefore, the motion to dismiss must be denied.

The cases cited by Defendants support Plaintiff's position. *Stanley v. University of Southern California* 13 F.3d 1313 (9th Cir. 1994) involved an action alleging discrimination in pay based on gender. The court held that the remedy at law is not adequate with regard to a request for an injunction to prevent future discrimination. *Id.* at 1321. Certainly, an injunction is equally appropriate to prevent future violations of constitutional rights of due process.

The case of *Caribbean Marine v. Baldriae* 844 F.2d 668 (9th Cir. 1988) supports Plaintiff's position. In *Caribbean Marine*, the plaintiff sought a preliminary injunction to prevent the government from using female observers on

tuna boats under the Marine Mammal Protection Act. The court held that the plaintiff was not entitled to a preliminary injunction because there was no showing that the plaintiff would suffer any injury whatsoever, as the result of female observers. The court explained that there was no evidence indicating that plaintiff would suffer any economic injury as a result of female (as opposed to male) observers. In this case, Plaintiff would suffer economic injury from continued unconstitutional action by Defendants. Moreover, this motion does not concern a request for a preliminary injunction. Defendants have filed a motion to dismiss Plaintiff's First Amended Complaint. Defendants are not entitled to an order of dismissal.

XII. CONCLUSION

Plaintiff respectfully submits that Defendants' argument in support of the motion to dismiss are completely without merit. Defendants seek to avoid a hearing on the merits because Defendants' position has no merit. Plaintiff respectfully submits that Defendants' motion to dismiss should be denied.

DATED: October 6, 1995

LEVIN, STEIN, CHYTEN & SCHNEIDER

By: /s/ Stephen A. Seideman
Stephen A. Seideman, Esq.
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	) CIVIL NO. 95-4839 R) NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES **The Honorable Manuel L. Real** DATE: 11-06-1995 TIME: 10:00 a.m. DEPT: Courtroom 8, U.S.D.C. 312 N. Spring St. Los Angeles, CA 90012

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

TO DEFENDANTS AND THEIR ATTORNEY OF RECORD:

NOTICE IS HEREBY GIVEN that on November 6, 1995, at 10:00 a.m., or as soon thereafter as the matter may be heard by the above-entitled Court, located at Courtroom 8, 312 N. Spring Street, #G-8, Los Angeles, California 90012, Plaintiff G & G FIRE SPRINKLERS, INC. will and hereby does move the Court for summary judgment, or in the alternative, summary adjudication of issues, on the ground that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, for the reasons set forth in the Memorandum of Points and Authorities filed and served concurrently herewith.

This motion will be based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the Statement of Uncontroverted Facts and Conclusions of Law, Request for Judicial Notice, and Exhibits in Support of Plaintiff's Motion for Summary Judgment filed concurrently herewith, all pleadings and papers on file in

this action, and upon such other matters as may be presented to the Court at the time of the hearing.

DATED: October 16, 1995

LEVIN, STEIN, CHYTEN & SCHNEIDER

By: /s/ [Illegible]
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20, Defendants.	CIVIL NO. 95-4839 R MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT **The Honorable Manuel L. Real** DATE: 11-06-1995 TIME: 10:00 a.m. DEPT: Courtroom 8, U.S.D.C. 312 N. Spring St. Los Angeles, CA 90012

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I.

NATURE OF THE CASE

Plaintiff contends that certain provisions of the California Labor Code are unconstitutional under the due process clause of the United States Constitution. Alternatively, Plaintiff contends that the application of the statutes by Defendants is unconstitutional. The statutes provide for the withholding of money from contractors as forfeitures and penalties on account of alleged violations of labor law, without a hearing.

Defendants include the Division of Labor Standards Enforcement, California ("DLSE"), and officials thereof. Defendants are responsible for enforcement of the aforesaid statutes.

Defendants have issued notices to withhold requiring awarding bodies to withhold money on account of alleged violations by Plaintiff. (Plaintiff denies any such violations. The notices to withhold were not based on complaints by Plaintiff's employees. Plaintiff believes that DLSE officials are participating in an effort by labor unions to force Plaintiff out of business because of its non-union status.) Plaintiff contends the notice to withhold procedure is in violation of the due process clause.

II.

RELIEF SOUGHT

Plaintiff seeks declaratory and injunctive relief. The relief sought will not prevent continued enforcement of California prevailing wage laws by proper means such as claims on statutory payment bonds, issuance of stop notices under the California Civil Code, or filing of lawsuits.

Plaintiff seeks a declaration that California Labor Code §§1727, 1730-33, 1775, 1776(g) and 1813 are unconstitutional. (A copy of *Cal. Labor Code* §§1720-1861 is Exhibit 9 hereto.) Plaintiff further seeks a declaration that Defendants' issuance of notices to withhold is unconstitutional, and that any such notices to withhold issued as to Plaintiff are invalid and of no force and effect. Plaintiff seeks an injunction prohibiting Defendants from applying or enforcing the aforesaid statutes against Plaintiff.

Alternatively, Plaintiff seeks a declaration that Defendants' application of the aforesaid statutes is unconstitutional, that notices to withhold against Plaintiff are invalid and without legal effect, and for an injunction

prohibiting Defendants from applying or enforcing the aforesaid statutes against Plaintiff.

III.

THE PARTIES

Plaintiff is a fire sprinkler contractor. (Ex. 1; Ben-Artzi Decl., p.1, l.5-12). Plaintiff installs fire sprinkler systems, primarily in new construction and/or renovation of existing buildings. (*Id.*) Plaintiff has performed work on public works projects in the State of California, and intends to continue to do so. (*Id.* at p.1, l.26-28). Most often, Plaintiff works as a subcontractor on public works projects. (*Id.*) Sometimes, Plaintiff works as a prime contractor on public works projects. (*Id.*)

Defendants include the Division of Labor Standards Enforcement, an agency of the State of California ("DLSE") and individuals (except Defendant AUBRY) who are officials/employees of DLSE. DLSE is a division of the Defendant Department of Industrial Relations of the State of California. Defendant AUBRY is the director of the Department of Industrial Relations. DLSE administers and enforces provisions of the California Labor Code, including those relating to the payment of prevailing wages on public works projects.

IV.

INTRODUCTION

Plaintiff filed a similar lawsuit previously (Case No. 94-8542-R). Prior to the initial lawsuit, DLSE had issued notices to withhold against Plaintiff on various projects

for which Plaintiff had acted as either a subcontractor or prime contractor. Plaintiff believed the allegations by DLSE were without merit, and that the notices to withhold constituted an effort to force Plaintiff out of business. DLSE settled the prior lawsuit by agreeing to release most of Plaintiff's money, in exchange for a dismissal without prejudice. Plaintiff agreed not to refile the lawsuit without further action by DLSE.

On or about July 11, 1995, DLSE issued a notice of penalty assessment, asserting penalties of $750 per day beginning July 1, 1995, and continuing indefinitely, on a project called CSU, San Bernardino (Ex. 29; Ex. 1, Ben-Artzi Decl., p.3, l.22-p.4, l.14). The penalty assessment indicated that Plaintiff had failed to comply with a request for copies of payroll reports within ten days. (*Id.*) Plaintiff was unaware of any request from DLSE for payroll reports. (The payroll reports are provided to the awarding body and/or prime contractor on all public works projects, and are public records.) Although Plaintiff agreed to provide the records forthwith, DLSE refused to rescind the penalty assessment. (*Id.*) DLSE has failed and refused to provide information regarding the factual basis for the penalty assessment, or how the amount thereof was calculated.[1] (*Id.*, Ex. 3, Seideman Decl., p.2,

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[1] Under California law, the only means available for a contractor to determine the basis for a notice to withhold is to file a lawsuit and undertake discovery. Moreover, under the statutes a subcontractor can file such a lawsuit only with an assignment by the prime contractor. Even the filing of a lawsuit does not assure that information as to the basis for the assessment of penalties is readily available. Under the statutes, the lawsuit oust be filed against the awarding body. Since DLSE

l.9-12). (Even if a penalty had been appropriate, it was grossly excessive because the statute (*Cal. Labor Code* §1776(g)) allows $25.00 per day, per employee, and Plaintiff had only a few employees.) On or about September 22, 1995, DLSE issued another notice to withhold on a project called Culver City, City Hall. (Ex. 2C; Ex. 1, Ben-Artzi Decl., p.4, l.19-25). The notice to withhold simply asserts that Plaintiff failed to pay "unnamed employees". (*Id.*) Plaintiff believes the notice to withhold is completely without merit. A third notice to withhold is pending on a project known as San Joaquin General Hospital, for which DLSE contends Plaintiff used improper classification of workers. (Ex. 1, Ben-Artzi Decl., p.3, l.1-13). Plaintiff disagrees, and believes the notice to withhold is without merit. (*Id.*)

The notices referred to above were issued without any hearing, pursuant to California law. (*Id.*, p.3, l.14-21). The notices include substantial penalties, which were assessed without any hearing. (Ex. 2)

Plaintiff contends that the assessment of penalties and forfeitures, and withholding money therefor, without a hearing violates the due process clause of the United States Constitution.

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is not a party, it is not subject to procedures for discovery as to a party. The only means of obtaining information from DLSE is to issue a subpoena for a deposition.

V.

SUMMARY OF ARGUMENT

The California Labor Code provides that all workers on a public works project must be paid "prevailing wages". The prevailing wage for each type of work is to be determined by the director of the Department of Industrial Relations. The statutes provide for the imposition of substantial penalties for violations of the prevailing wage requirements, and for payment of back wages. The public entity awarding the public works contract ("Awarding Body") is to withhold from the prime contractor any amount due for wages and/or penalties due to violations of the prevailing wage law. If the violation is by a subcontractor, the labor code provides for withholding payment from the subcontractor.

DLSE has adopted a procedure of issuing notices to withhold to Awarding Bodies directing the withholding of specified amounts of money purportedly due for wage violations and/or penalties. The notices to withhold are issued by enforcement officials of DLSE known as deputy labor commissioners. The deputy labor commissioner functions, essentially, in the capacity of an investigative officer. The notices to withhold are issued without any hearing. Notices to withhold may be, and often are, issued without any advance notice to the contractor. A contractor has no right to be notified of the allegation against it, or respond thereto, prior to the issuance of a notice to withhold. There is no procedure for a prompt hearing after the issuance of the notice to withhold.

Under the statutes, there is no remedy provided as a matter of right to a subcontractor aggrieved by a notice to

withhold. The only remedy available to a prime contractor is to file a lawsuit to seek recovery of the money withheld. The contractor has the burden of proof in such lawsuit to establish its right to recover the money. The due process clause of the United States Constitution requires a pre-deprivation hearing before withholding of the type described above can be effectuated. A pre-deprivation hearing may be dispensed with only under certain emergency circumstances justifying a temporary deprivation without a hearing. Under such circumstances, a prompt post-deprivation hearing must be provided. There are no emergency circumstances justifying issuance of notices to withhold without a pre-deprivation hearing. Moreover, there is no procedure for a prompt post-deprivation hearing. A subcontractor has no right to a hearing at any time. The right of a prime contractor to file a lawsuit seeking recovery of the money is not a prompt post-deprivation hearing required by due process. Moreover, DLSE never has the burden, at any time, to establish a violation. Labor Code §§1727, 1730-33, 1775, 1776(g), and 1813 are unconstitutional. The aforesaid statutes provide for the assessment of penalties and forfeitures, and withholding of money on account thereof, without a pre-deprivation hearing, or alternatively, without a prompt post-deprivation hearing.

Defendants' procedure of withholding money from contractors without a proper due process hearing is unconstitutional.

VI.

STATEMENT OF FACTS

A. THE STATUTORY SCHEME

The statutes relating to the payment of prevailing wages on public works projects are set forth at California Labor Code §§1720-1861 (*See*, Ex. 9, Copies of Statutes). Section 1771 provides that prevailing wages must be paid to all workers on public works projects. Section 1772 provides that the prevailing wage requirement applies to subcontractors. Section 1775 provides for penalties of up to $50.00 per day, per worker, for each violation. Section 1727 provides that wages and penalties due shall be withheld by the Awarding Body from monies otherwise due the contractor. Section 1729 provides that if the withholding from the prime contractor is due to a violation by a subcontractor, the prime contractor may withhold such amount from the subcontractor. Sections 1730-1733 provide that the only remedy after withholding is a lawsuit by the contractor, or its assignee, against the Awarding Body for recovery of the money withheld. The contractor has the burden to establish its right to the money withheld. *Cal. Labor Code* §1733. DLSE may (and does) defend the lawsuit. *Cal. Labor Code* §1733. There is no right of a subcontractor to challenge the withholding, except to the extent it obtains an assignment from the prime contractor. *Cal. Labor Code* §§1730-1731. Section 1776(g) provides for penalties for failure to comply with a request for payroll records within ten days, and for withholding on account thereof upon request of DLSE. Section 1813 provides for penalties for overtime work. Section 1727 provides for

withholding of penalties assessed under §1813. No hearing is required for assessment of the penalties, or withholding thereof.

The notice to withhold procedure utilized by DLSE is not expressly provided for by statute. *Cal. Labor Code* §90.5 provides that DLSE has authority to administer, and enforce, provisions of the Labor Code. including those relating to prevailing wages. Section 1727 provides that DLSE may investigate violations, and §1775 provides that the penalties are to be determined by the Labor Commissioner. The Labor Commissioner is the chief of DLSE. *Cal. Labor Code* §21. The Office of the Labor Commissioner, and DLSE, are the same entity. (Ex. 4, Miller depo. p.16, l.8-10). The California Courts have held that DLSE has statutory authority to issue notices to withhold. *Krueger v. San Francisco* 198 Cal.App.3d 1, 243 Cal.Rptr. 585 (1988).

B. THE NOTICE TO WITHHOLD PROCEDURE

The issuance of a notice to withhold is a standard procedure utilized by DLSE, purportedly to enforce the prevailing wage law.

Under the procedure utilized by DLSE, a deputy labor commissioner may authorize, execute, and issue a notice to withhold, with the approval of a senior deputy. (Ex. 4, Miller depo., p.34, l.12-p.35, l.13). There is no requirement that any type of hearing be held prior to the issuance of a notice to withhold. (*See*, Uncontroverted fact 18). There is no specific standard or burden to be applied in determining whether to issue a notice to withhold. (Ex. 4, Miller depo. p.39, l.21-24). There is no procedure to guard against the issuance of improper or excessive

notices to withhold. (Ex. 4, Miller depo. p.39, l.12-24; p.143, l.2-23).

The notice to withhold is issued on a standard form. (A copy is Exhibit 2 hereto). The notice to withhold is directed to the awarding body, and states that the amount of money stated therein must be withheld pursuant to the provisions of the Labor Code. (Ex. 2). The notice further states that the awarding body is to transmit the monies withheld to DLSE unless the contractor files a lawsuit for the recovery of money not later than ninety days after the completion of the project. (Ex. 2).

C. APPLICATION OF THE NOTICE TO WITHHOLD PROCEDURE TO PLAINTIFF

DLSE has issued notices to withhold against Plaintiff as both a prime contractor, and subcontractor. (Ex. 1, Ben-Artzi Decl., p.2, x.22-28). DLSE presently has three notices to withhold issued against Plaintiff, totalling more than $150,000. (*Id.* at p.3, l.14; Ex. 2). DLSE previously issued notices to withhold against Plaintiff for approximately $300,000, but which notices were eventually released. (Ex. 1, Ben-Artzi Decl., p.2, l.9-21: p.3, l.1-4). Plaintiff intends to continue to perform public works projects in California, as both a subcontractor and prime contractor. (*Id.* at p.1, l.27-28). Therefore, the existence of the unconstitutional statutes, and application thereof, constitutes a real and substantial threat of future harm to Plaintiff. (*Id.* at p.5, l.1-14).

VII.
ARGUMENT

Plaintiff contends that the assessment of penalties and forfeitures, and withholding money therefor, without a hearing, is unconstitutional. The vesting of such unconstitutional power in DLSE results, inevitably, in an abuse of power. DLSE can, and does, utilize the power to coerce money from contractors. Since large sums of money can be withheld, with no remedy except a lengthy lawsuit, DLSE can force contractors out of business and/or force contractors to forfeit sums of money to the state in exchange for a release of remaining monies withheld. Furthermore, DLSE officials can arbitrarily and selectively target contractors for harassment.

The power of state officials is not limited merely by their good intentions, which may be disregarded at their whim. Constitutional limitations have been established to prevent the abuse of such power. Plaintiff submits that the statutes, and procedures, are unconstitutional, and their enforcement or application against Plaintiff should be enjoined.

A. THE NOTICE TO WITHHOLD PROCEDURE IS UNCONSTITUTIONAL

1. A hearing is required for a temporary, non-final deprivation of property

The Fourteenth Amendment to the United States Constitution provides that no State shall deprive any person of property without due process of law. A temporary, non-final deprivation of property is a deprivation

under the terms of the Fourteenth Amendment. *Fuentes v. Shevin* 407 U.S. 67, 85; 32 L.Ed. 556, 572; 92 S.Ct 1983 (1972); *Sniadach v. Family Finance Corp.* 395 U.S. 337: 23 L.Ed.2d 349: 89 S.Ct 1820 (1969). Due process requires a hearing for a deprivation, including a temporary non-final deprivation. *Fuentes supra, Sniadach supra.* "The right to prior notice and a hearing is central to the Constitution's command of due process." *United States v. James Daniel Good Real Property* 510 U.S. ___; 114 S.Ct. 492, 492, 126 L.Ed.2d 490 (1993).

2. This case involves regulatory, not proprietary conduct of the State

It should be noted that this case involves state officials acting in a regulatory, and not proprietary manner. The question of the application of due process to proprietary conduct of the State is not presented by this case, and need not be addressed by the Court. The courts have explained that there is sometimes a distinction in the restrictions placed on State conduct depending on whether the State is acting in its regulatory capacity, or in a proprietary manner. *See, Building Trades v. Associated Builders and Contractors* 507 U.S. ___, 122 L.Ed.2d 565, 113 S.Ct. 1190 (1993). The State acts in a proprietary manner when, as an owner of property, it conducts business as would any private owner of property, with no interest is setting policy. *Id.* at 576, 577. This case involves conduct by Defendants which is wholly regulatory. To wit, the imposition of penalties for alleged violations of the state labor code. The mandates of due process are fully applicable.

3. The notice to withhold causes a deprivation of a property interest

The issuance of a notice to withhold based on alleged violations by Plaintiff deprives Plaintiff of a property interest under the due process clause. California Labor Code §1729 provides that if an awarding body withholds money from a prime contractor due to alleged violations of a subcontractor, the prime contractor may withhold money from the subcontractor. Therefore, whether Plaintiff acts as a prime contractor, or subcontractor, the issuance of a notice to withhold results in the deprivation of money due for work performed.

In *Bailey v. Secretary of the United States Department of Labor* 810 F.Supp. 261 (D. Alaska 1993) the court held that withholding money from a contractor due to alleged prevailing wage violations was a deprivation of property. The court also so held in *Ames Const. v. Dole* 727 F.Supp. 502 (D. Minn. 1989), wherein the court stated: "The court finds that the government's suspension of payments to Ames does constitute a deprivation of property subject to the due process clause of the Fifth Amendment."

In *Fuentes*, the party did not hold legal title to the goods seized, but merely had a possessory interest. The court held that "the interest in continued possession and use of the goods" was a property interest protected by the due process clause. *Fuentes supra* at 86. The court stated that the Fourteenth Amendment "has been read broadly to extend protection to any significant property interest." *Id.* at 86. In *Goldberg v. Kelly* 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970) the court held that the right to receive government welfare payments was a property interest

protected by the due process clause. *United States v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 492, 126 L.Ed.2d 490 (1993) involved the non-final seizure of real property which was rented to tenants. The court stated that the government "contends that the tangible effect of the seizure was limited to taking the $900 a month he was due in rent. But even if this were the only deprivation at issue, it would not render the loss insignificant or unworthy of due process protection." *Daniel supra*, at 501. The court in *Daniel* explained that "individual freedom finds tangible expression in property rights." *Id.* at 505. Certainly, the right to receive contract payments for work performed is a property interest protected by the due process clause.

4. A pre-deprivation hearing is required except in extraordinary circumstances

Generally, a pre-deprivation hearing is required by due process. *Fuentes supra, Sniadach supra.* However, a postdeprivation hearing is allowed in extraordinary situations. *Fuentes supra* at 90. "Only in extraordinary circumstances involving the necessity of quick action by the State or the impracticality of providing any meaningful pre-deprivation process may the government dispense with the requirement of a hearing prior to the deprivation.". *Sinaloa Lake Owners Association v. City of Simi Valley* 882 F.2d 1398, 1405 (9th Cir. 1989). "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial

deprivation." *Federal Deposit Insurance Corporation v. Mallen* 486 U.S. 230, 242; 11 L.Ed.2d 265; 108 S.Ct. 1780 (1988). In order to justify proceeding without a pre-deprivation hearing there must be "a special need for very prompt action." *Fuentes supra* at 91. "To establish exigent circumstances, the Government must show that less restrictive measures . . . would not suffice." *United States v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 505; 126 L.Ed.2d 490 (1993). The requirement of neutral decisionmaking "is of particular importance . . . where the Government has a direct pecuniary interest in the outcome of the proceeding." *Id.* at 502.

5. A pre-deprivation hearing is needed for a notice to withhold

There is no special need for prompt action with regard to withholding money from a contractor.

There are no extraordinary circumstances justifying prehearing withholding for alleged wages due. The only conceivable argument is that withholding is necessary to secure the availability of funds to pay underpaid workers. However, the notice to withhold procedure is unnecessary in this regard. Under California law, a payment bond issued by a surety company must be provided for every public works project.[2] *Cal. Civil Code* §§3247, 3248. The bond guarantees payment of wages due. Moreover, the Stop Notice Procedure in the California Civil

[2] There is an insignificant exception for projects under $25,000.

Code allows for withholding of money due for wages on all public works projects. *Cal. Civil Code* §3181 *et seq.*

In *United States v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 492, 126 L.Ed.2d 490 (1993) the court held that a pre-deprivation hearing was required before seizure of real property used for drug dealing. The court held that seizure after ex parte application to a magistrate, and approval thereof, was violative of due process. The court stated that the government must show that less restrictive measures, such as a "bond," would not suffice. *Daniel supra.* at 505. Where means, short of seizure, are available, "[t]here is no reason to take the additional step of asserting control over the property without first affording notice and an adversary hearing." *Daniel supra.* at 504. A bond guaranteeing payment of wages is posted for every public works project in California. Additionally, statutory stop notice rights apply to wage claims. There are no exigent circumstances justifying seizure without an adversary hearing.

As to penalties, clearly there is no special need for very prompt action. There is no imminent injury to be suffered by a delay in the collection of punitive sanctions.

In *Daniel supra* the court stated:

> "The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking. That protection is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding. It makes sense to scrutinize governmental action more closely when the State stands to benefit." *Id.* at 502 [citations omitted].

The State of California keeps penalties seized by DLSE. (*See*, Uncontroverted fact 34). The State has a direct pecuniary interest in maximizing it's ability to coerce money from contractor's. The withholding of money without a neutral hearing is an effective way to coerce an agreement to forfeit of a portion thereof. The action of the State in this case deserves close scrutiny, as the State has a direct pecuniary interest.

The court in *Daniel* found that "the practice of ex pane seizure . . . creates an unacceptable risk of error." *Daniel supra*. at 501. The court noted that " 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . No better instrument has been devised for arriving at truth than to provide a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' " *Daniel supra*. at 502, quoting *Joint Anti-fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-172; 71 S.Ct. 624, 647-649; 95 L.Ed. 817 (1951).

A failure to provide pre-deprivation hearing renders the notice to withhold procedure unconstitutional.

6. Where extraordinary circumstances Justify dispensing with a pre-deprivation hearing, a prompt post-deprivation hearing must be provided

Where extraordinary circumstances justify dispensing with a pre-deprivation hearing, a prompt post-deprivation hearing must be provided. *Federal Deposit Insurance Corporation v. Mallen* 486 U.S. 230, 242; 11 L.Ed.2d 265; 108 S.Ct. 1780 (1988). In determining whether a post-deprivation hearing procedure is reasonably prompt the court should "examine the importance of

the private interest and the harm to this interest occasioned by the delay; the justification offered by the government for delay in its relation to the underlying governmental interests: and the likelihood that the interim decision may have been mistaken." *Mallen supra* at 242. In *Awes Const. v. Dole* 727 F.Supp. 502 (D. Minn. 1989) the court held that where money is withheld from a contractor due to alleged prevailing wage violations without a pre-deprivation hearing, the contractor is "entitled to a reasonably prompt post-suspension hearing." *Id.* at 509.

7. A prompt post-deprivation hearing is not available under the notice to withhold procedure

Assuming arguendo that Defendants are not required to provide a pre-deprivation hearing with regard to the issuance of a notice to withhold, there must be a prompt post-deprivation hearing. The procedure utilized by Defendants does not provide for a prompt post-deprivation hearing. The only procedure for obtaining a hearing is the filing of a lawsuit by the prime contractor, or its assignee. A subcontractor has no right whatsoever to a hearing, except to the extent it obtains an assignment from the prime contractor. The right of a prime contractor, or its assignee, to file a lawsuit, does not constitute a prompt post-deprivation hearing.

The time for a trial on such a lawsuit filed in State Court is subject to the court's discretion, and the court's calendar. A plaintiff's only right is to have a trial within

five years. *Cal. Code of Civil Procedure* §583.310. The scheduling of a trial may be greatly impacted by matters affecting court congestion, such as the recently adopted "three strikes" legislation. Moreover, even if a contractor prevails in such a lawsuit, the monies remain withheld pending any appeal. *Krueger v. San Francisco* 198 Cal.App.3d 1, 243 Cal.Rptr. 585 (1988): *Cal. Labor Code* §1731. Generally, a final determination of a lawsuit will take at least several years. (Ex. 3, Seideman Decl., p.1, l.27-p.2, l.8). A contractor has no right to a determination in any shorter period. The right of a prime contractor, or its assignee, to file a lawsuit to recover the money withheld is not the prompt post-deprivation hearing required by due process. Moreover, a subcontractor has no right to file such a lawsuit.

The court in *Bailey v. Secretary of the United States Department of Labor* 810 F.Supp. 261 (D. Alaska 1993) held that withholding money for purported prevailing wage violations was unconstitutional where the contractor had to wait six months to one year to obtain release of monies improperly withheld. Under the procedure in issue here, a contractor must wait years to obtain release of monies improperly withheld. Moreover, a subcontractor has no right of its own to contest the withholding. Inasmuch as there is no pre-deprivation hearing, and no right to a prompt postdeprivation hearing, the procedure is unconstitutional.

In *United States v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 505; 126 L.Ed.2d 490 (1993) the court found that a post-seizure right to a trial was insufficient to allow a pre-hearing seizure. The court stated that "the availability of a post-seizure hearing may be no recompense for losses caused by erroneous seizure. Given

the congested civil dockets in federal courts, a claimant may not receive an adversary hearing until many months after the seizure." *Id.* at 502.

The application of the *Mallen* factors mandate that the procedure fails to provide a reasonably prompt post-deprivation hearing. *See, Federal Deposit Insurance Corporation v Mallen* 486 U.S. 230, 242; 11 L.Ed.2d 265; 108 S.Ct. 1780 (1988).

The first *Mallen* factor is the importance of the private interest and the harm to this interest occasioned by the delay. The private interest is the right to receive payment for work performed. Only a small portion of a contractor's payment is attributable to profit. Most of a contractor's price is determined by actual costs of performance. (*See*, Ex. 1, Ben-Artzi Decl., p.5, l.1-7). The receipt of monies due for work performed are necessary to pay for materials and labor incurred in the work. The withholding of money deprives the contractor of the ability to cover its costs. The result is not merely a temporary loss of profit, but a threat to the contractors survival. A contractor can very easily be forced out of business if it is deprived of money to pay wages and suppliers.

The aforesaid problem was referred to by the court in *Bailey v. Secretary of the United States Department of Labor* 810 F.Supp. 261 (D. Alaska 1993). In *Bailey*, the court held that the Department of Labor's withholding of money from a contractor due to alleged prevailing wage violations was unconstitutional where a post-deprivation hearing would take from six months to a year. The court stated:

"It is undisputed that plaintiff received no due process hearing by a neutral decision maker prior to suspension of the payments due her for contract work performed for the government. While the Department of Labor has commenced an administrative proceeding against plaintiff, it is undisputed that these proceedings will take from six months to a year to reach a conclusion as to whether or not plaintiff was in fact underpaying her employees and, if so, in what amount.

"It is undisputed that without the cash flow from the contracts, plaintiff will not be able to continue to perform the contracts. She will in substance be put out of business: and the ten employees who are employed under the two contracts in question will be out of work.

> In order to recover immediately (and hold for six months to a year) the sums of money arguably due plaintiff's employees, defendant has come perilously close to destroying plaintiff's business and, in the process, terminating the jobs of the ten employees who defendant would theoretically benefit – six months to a year from now." *Id.* at 262-263.

The failure to provide a prompt hearing causes substantial harm to an important private interest. The cutting off of cash flow to a contractor may not only force the contractor out of business, but force all of its employees. into the unemployment lines.

The second *Mallen* factor is the governmental justification for the delay, and its relation to the governmental

interest. Plaintiff is not aware of any legitimate justification for the delay. The delay bears no relation to any legitimate governmental interest.

The third *Mallen* factor is the likelihood of mistake. In *United States v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 505; 126 L.Ed.2d 490 (1993) the court, in holding that seizure of real property used for drug dealing after ex parte hearing was unconstitutional, said "[t]he practice of ex parte seizure, moreover, creates an unacceptable risk of error." *Id.* at 501.

In *Chalkboard v. Brandt* 902 F.2d 1375 (9th Cir. 1989) the court explained, that the risk of erroneous deprivation is high where the underlying determination is based on credibility of witnesses. The court stated that the risk of error is less "where the factual issue to be determined was susceptible of reasonably precise measurement by external standards." *Id.* at 1381. For example, chemical testing of a horse for drugs, *Barry v. Barachi* 443 U.S. 55, 65; 99 S.Ct. 2642, 2649; 61 L.Ed.2d 365 (1979); or suspension of a driver's license when convicted of a predetermined number of offenses. *Dixon v. Love* 431 U.S. 105, 113; 97 S.Ct. 1723, 1727; 52 L.Ed.2d 321 (1979).

The determination of purported prevailing wage violations generally involves judgments depending on credibility of witnesses. For example, DLSE asserted a notice to withhold against Plaintiff based on purported "unnamed employees". (Ex. 2C; Ex. 1, Ben-Artzi Decl., p.4, l.19-25). Plaintiff contends that no such unnamed employees exist, but rather are mere fabrications of DLSE. (*Id.*) The factual issue depends on the credibility of

witnesses. There is no precise objective external measurement, such as a chemical test, or pre-determined convictions. Under such circumstances, the risk of an erroneous deprivation is high where no hearing is provided. *Chalkboard supra*.

There is no reasonably prompt post-suspension hearing at which a contractor has the right to obtain release of money withheld.

VI.

CONCLUSION

California Labor Code §§1727, 1730-33, 1775, 1776(g) and 1813 are unconstitutional. The notice to withhold procedure utilized by Defendant's is unconstitutional.

Declaratory relief is a proper remedy. 28 U.S.C. 2201. Plaintiff respectfully submits that the court should issue a judgement declaring that the aforesaid statutes are unconstitutional, the notice to withhold procedure is unconstitutional, and that any notices issued as to alleged violations by Plaintiff are invalid.

An injunction is also a proper remedy. The unconstitutional withholding of money causes the threat of irreparable injury for which there is no adequate remedy at law. The eventual recovery of money withheld does not avoid the harm from the inability to use the money in the meantime, or the irreparable damage to reputation. Plaintiff respectfully submits that Defendant should be

enjoined from enforcing or applying the aforesaid statutes, or issuing notices to withhold, as to Plaintiff.

DATED: October 16, 1995

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& SCHNEIDER

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	CIVIL NO. 95-4839 R REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT **The Honorable Manuel L. Real** DATE: 11-06-1995 TIME: 10:00 a.m. DEPT: Courtroom 8, U.S.D.C. 312 N. Spring St. Los Angeles, CA 90012

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

Plaintiff hereby requests that the Court take judicial notice of the following facts in accordance with Rule of Evidence 201:

1. Defendants AUBRY, MILLER, and BRADSHAW were defendants in the lawsuit titled *G & G Fire Sprinklers, Inc. v. Juan Garza, et al.*, Case No. CV-94-8542 R. The court is further requested to take judicial notice of the papers and pleadings filed in said lawsuit.

2. Defendant LLOYD W. AUBRY, JR., is the Director of the Department of Industrial Relations, State of California.

DATED: October 16, 1995

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G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA	) CIVIL NO. 95-4839 R) STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW [Central District Local Rule 7.14.1] **The Honorable Manuel L. Real** DATE: 11-06-1995 TIME: 10:00 a.m. DEPT: Courtroom 8, U.S.D.C. 312 N. Spring St. Los Angeles, CA 90012

FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

After consideration of the papers in support of and in opposition to plaintiff's motion for summary judgment and the oral argument of counsel, the Court determines that the following facts have been established as,

UNCONTROVERTED FACTS

1. The Department of Industrial Relations of the State of California is an agency of the State of California.

[*Cal. Labor Code* § 50.]

2. The Division of Labor Standards Enforcement (hereinafter "DLSE") is a division of the Department of Industrial Relations of the State of California.

[*Cal. Labor Code* § 79.]

3. The Labor Commissioner of the State of California is the chief of DLSE.

[*Cal. Labor Code* § 21.]

4. Defendant Lloyd W. Aubry, Jr. is the Director of the Department of Industrial Relations of the State of California.

[Plaintiff's Request for Judicial Notice, paragraph 2.]

5. Defendant Victoria Bradshaw was the Labor Commissioner for the State of California.

[Ex. 4, Deposition of Roger D. Miller, Volume I, page 15, line 22 – page 16, line 2; Bradshaw resigned effective September 30, 1995, and no replacement has been appointed.]

6. Defendant Roger Miller is a Senior Deputy Labor Commissioner employed by DLSE.

[Ex. 4, Deposition of Roger Miller, p.7, l.14-17; p.10, l.5-7; Ex. 1, Declaration of Itai Ben-Artzi, p.4, l.11-13.]

7. Defendants Daniel Dellarocca and Rosa Frazier are Deputy Labor Commissioners employed by DLSE.

[Ex. 2 A, Notice to Withhold; Ex. 2D, Notice to Withhold.]

8. California law requires that persons performing work at public works projects in California be paid "prevailing wages".

[*Cal. Labor Code* § 1771.]

9. California law provides for the imposition of penalties upon contractors responsible for violations of laws relating to the payment of prevailing wages at public works projects.

[*Cal. Labor Code* §§ 1775, 1776(g), 1813.]

10. California Labor Code §§ 1727, 1730-33, 1775, 1776(g) and 1813 provide for the assessment of penalties, and withholding of money on account thereof from a prime contractor, without a prior hearing.

[*Cal. Labor Code* §§ 1727, 1730-33, 1775, 1776(g), 1813.]

11. California Labor Code §§ 1727 and 1775 provide for the assessment of wages due by a prime contractor, or any subcontractor thereof, and withholding of money therefor from the prime contractor, without a prior hearing.

(*Cal. Labor Code* §§ 1727, 1775.]

12. The California Labor Code provides that where money is withheld from a prime contractor on account of a prevailing wage violation by a subcontractor, the prime contractor may withhold such money from the subcontractor.

[*Cal. Labor Code* § 1729.]

13. DLSE undertakes the function of enforcement of the California Labor Code provisions relating to payment of prevailing wages.

[Ex. 4, Deposition of Roger D. Miller, Volume I, page 7, lines 14-17; page 10, lines 13-17; page 13, lines 18-25.]

14. The aforesaid prevailing wage requirement applies to all construction projects for which the entity awarding the prime contract is a public entity (hereinafter referred to as the "Awarding Body").

[*Cal. Labor Code* §§ 1720, 1722.]

15. Defendants have adopted, and utilized, the practice and procedure of issuing notices to withhold money to Awarding Bodies on account of wages and penalties due for alleged violations of the California laws relating to payment of prevailing wages.

[Ex. 2, Notices to Withhold;

Ex. 4, Deposition of Roger D. Miller, Volume I, page 33, line 10 - page 41, line 19; page 71, lines 3-10; page 149, lines 13-16.]

16. The notices to withhold issued by defendants require Awarding Bodies to withhold monies otherwise due to contractors in the amount set forth in the notice.

[Ex. 2, Notices to Withhold;

Ex. 5, Deposition of Roger D. Miller, Volume II, page 301, lines 8-12.; Exhibits 2A, 2B, 2C and 2D, Notices to Withhold;

Ex. 1, Declaration of Itai Ben-Artzi, page 3, lines 9-11.]

17. The result of the issuance of a notice to withhold by Defendants is the withholding of money otherwise due and payable to contractors who have been the subject of such notice to withhold.

[Ex. 4, Deposition of Roger D. Miller, Volume I, page 301, lines 8-12: Exhibits 2A, 2B, 2C and 2D, Notices to Withhold;

Ex. 1, Declaration of Itai Ben-Artzi, page 3, lines 9-11.]

18. There is no hearing of any type held prior to the issuance of a notice to withhold for the purpose of determining whether violations of the law have occurred, and

if so, to what extent, or the amount of wages and penalties due as a result thereof.

[*Cal. Labor Code* §§ 1727, 1776(g); Ex. 1, Declaration of Itai Ben-Artzi, page 3, lines 14-17;

Ex. 4, Deposition of Roger D. Miller, Volume I, page 33, line 10 - page 41, line 19; page 71, lines 3-10; page 1, lines 1-16; page 143, lines 2-23; page 150, lines 14-18; page 179, lines 11-21; page 184, lines 18-20.;

Ex. 5, Deposition of Roger D. Miller, Volume II, page 266, line 16 - page 267, line 1: 23; page 238, line 14 - page 240, line 5.]

19. Notices to withhold may be, and often are, issued without advance notice to the contractor. There is no requirement that prior to the issuance of a notice to withhold, the contractor be notified of the allegation against it, with evidence supporting said allegation, or that a contractor be provided an opportunity to respond thereto.

[Ex. 1, Declaration of Itai Ben-Artzi, page 3, lines 14-21;

Ex. 4, Deposition of Roger D. Miller, Volume I, page 33, line 10 - page 41, line 19; page 71, lines 3-10; page 1, lines 1-16; page 143, lines 2-23; page 150, lines 14-18; page 179, lines 11-21; page 184, lines 18-20;

Ex. 5, Deposition of Roger D. Miller, Volume II, page 266, line 16 - page 267, line 1; page 238, line 14 - page 240, line 5.J

20. A prime contractor has no right to a hearing to obtain release of money withheld by a notice to withhold,

except for the right to file a lawsuit under California Labor Code § 1731-1733.

[*Cal. Labor Code* 1731-1733;

Ex. 1, Declaration of Itai Ben-Artzi, page 3, lines 1220.]

21. A prime contractor must obtain a judgment which is final, including all rights of appeal, in a lawsuit filed under *Cal. Labor Code* §§ 1731-1733 in order to have a right to obtain release of movies withheld pursuant to a notice to withhold.

[*Cal. Labor Code* § 1731; *Krueger v. San Francisco* 198 Cal.App.3d 1, 243 Cal.Rptr. 585 (1988).]

22. A subcontractor whose alleged violation of prevailing wage law is the basis of a notice to withhold has no right to a hearing as to the notice to withhold, unless the subcontractor obtains an assignment of the prime contractor's right to a lawsuit under *Cal. Labor Code* § 1731-1733.

[*Cal. Labor Code* § 1732.]

23. Plaintiff is a contractor who performs primarily fire sprinkler installations at projects in the State of California.

[Ex. 1, Declaration of Itai Ben-Artzi, page 1, lines 10-13.]

24. Plaintiff has performed, and intends to continue to perform, work on a number of public works projects in the State of California. Plaintiff has performed such work, and intends to perform such work in the future, as both a subcontractor and prime contractor.

[Ex. 1, Declaration of Itai Ben-Artzi, page 1, lines 26-28; page 2, lines 1 - 8.]

25. DLSE has issued notices to withhold on account of alleged violations of prevailing wage law by Plaintiff where Plaintiff has acted as subcontractor, and prime contractor.

[Ex. 1, Declaration of Itai Ben-Artzi, page 2, lines 22-28.]

26. DLSE has issued notices to withhold to the Awarding Bodies of various public works projects on account of alleged violation of the prevailing wage law by Plaintiff. The projects for which such notices to withhold have been issued include those known as Moore Hall Seismic Renovation at the University of California, Los Angeles; University Center at the University of California, Santa Barbara; Recreation Center at the University of California, Santa Barbara; The Pyramid at California State University, Long Beach; Anaheim City Utilities Building; CSU, San Bernardino; San Joaquin General Hospital; Culver City, City Hall.

[Exhibits 2A, 2B, 2C and 2D, Notices to withhold;

Ex. 1, Declaration of Itai Ben-Artzi, page 2, lines 9-21.]

27. The aforesaid notices to withhold issued regarding Plaintiff were issued without any prior hearing.

[Ex. 1, Declaration of Itai Ben-Artzi, page 3, lines 14-17.]

28. Plaintiff disputes the correctness of the notices to withhold.

[Ex. 1, Declaration of Itai Ben-Artzi, page 2, lines 19-21.]

29. As a result of those notices to withhold still pending, which were issued by DLSE as to Plaintiff, there is at least $120,000 which has been withheld from monies otherwise due to Plaintiff.

[Ex. 1, Declaration of Itai Ben-Artzi, page 4, lines 26-28.]

30. The effect of a notice to withhold is to reduce, or cut off, payments to Plaintiff for work performed. Inasmuch as Plaintiff intends to perform further public works projects in the future, there is a substantial and imminent threat that the issuance of additional improper notices to withhold would impair Plaintiff's cash flow, and affect its ability to do business.

[Ex. 1, Declaration of Itai Ben-Artzi, page 5, lines 1-14.]

31. The issuance of notices to withhold affects Plaintiff's reputation in the industry.

[Ex. 1, Declaration of Itai Ben-Artzi, p. 5, lines 12- 14.]

32. Under California law a payment bond issued by an approved surety must be posted for every public works project, except for projects less than $25,000. The payment bond provides a guarantee of the payment of, among other things, wages due to persons who work at the project.

[*Cal. Civil Code* § 3247, 3248]

33. The stop notice procedure for public works in California allows for withholding by awarding body of money upon a claim for wages due.

[*Cal. Civil Code* § 3181.]

34. The monies collected by DLSE as penalties for violations of the prevailing wage law are kept and used by the State of California.

[Ex. 4, Miller depo. p.157, l.5-13; *Cal. Labor Code* § 1775.]

35. Defendants AUBRY, BRADSHAW and MILLER were parties to a prior lawsuit filed by Plaintiff, and dismissed without prejudice pursuant to a settlement agreement, alleging that the withholding of money for alleged violations of the California prevailing wage law without a prior hearing, or prompt post-deprivation hearing, was unconstitutional under the due process clause of the United States Constitution.

[Plaintiff's Request for Judicial Notice, paragraph 1.]

Based on the foregoing Uncontroverted Facts, the Court now makes its,

CONCLUSIONS OF LAW

1. This Court has jurisdiction under 42 U.S.C. 1983, 28 U.S.C. 1343 (a)(4), and 28 U.S.C. 2201-2202.

2. California Labor Code §§ 1727, 1730-33, 1775, 1776(g) and 1813 violate the due process clause of the fourteenth amendment of the United States Constitution.

3. The assessment of penalties and the withholding of money from contractors for violations of the California

prevailing wage law without a prior hearing violates the due process clause of the fourteenth amendment to the United States Constitution.

4. The notice to withhold procedure utilized by Defendants is unconstitutional under the due process clause.

5. An actual controversy exists between Plaintiff and Defendants with regard to the constitutional issues referred to above.

6. Defendants procedure for withholding without a prior hearing results in irreparable injury and substantial threat of irreparable injury, for which there is no adequate remedy at law.

7. Judgment for declaratory relief and injunctive relief shall be issued consistent herewith.

Dated: _____

_____
UNITED STATES
DISTRICT JUDGE

G&GFIRE:Bradshaw'acts.Stm

(Certificate Of Service Omitted In Printing)

(9)

No. 00-152

Supreme Court, U.S.
FILED
DEC 4 - 2000
CLERK

In The

Supreme Court of the United States

ARTHUR S. LUJAN, et al.,

Petitioners,

vs.

G & G FIRE SPRINKLERS, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

Volume II, Pages 187 to 395

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Petition For Certiorari Filed July 26, 2000
Certiorari Granted October 10, 2000

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PLAINTIFF'S RESPONSE TO DEFENDANTS' OBJECTION TO ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND JUDGMENT 394

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	CIVIL NO. 95-4839 R EXHIBITS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT **The Honorable Manuel L. Real** DATE: 11-06-1995 TIME: 10:00 a.m. DEPT: Courtroom 8, U.S.D.C. 312 N. Spring St. Los Angeles, CA 90012

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

EXHIBITS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

EXHIBIT 1: Declaration of Itai Ben-Artzi

EXHIBIT 2A: Notice to Withhold re: CSU, San Bernardino

EXHIBIT 2B: Notice to Withhold re: CSU, San Bernardino

EXHIBIT 2C: Notice to Withhold re: Culver City, City Hall

EXHIBIT 2D: Notice to Withhold re: San Joaquin General Hospital

EXHIBIT 3: Declaration of Stephen A. Seideman

EXHIBIT 4: Deposition of Roger D. Miller, Volume I, December 8, 1994

EXHIBIT 5: Deposition of Roger D. Miller, Volume II, January 19, 1995

EXHIBIT 6: Deposition of Juan Garza, June 7, 1994

EXHIBIT 7: Letter, dated August 24, 1994, from Stephen A. Seideman to Division of Labor Standards Enforcement

EXHIBIT 8: Letter, dated August 25, 1995, from Jack Fleming to Division of Labor Standards Enforcement, and attached letter from California State University dated August 22, 1995

EXHIBIT 9: California Labor Code Sections 1720-1861

EXHIBIT 1

DECLARATION OF ITAI BEN-ARTZI

I, Itai Ben-Artzi, declare:

1. I am president of G & G Fire Sprinklers, Inc. (hereinafter "G&G"). I have been president of G&G since 1990.

2. G&G is a corporation organized under the laws of the State of California and qualified to do business in California. G&G is a fire protection contractor licensed as such by the Contractors License Board of the State of California.

3. G&G performs the installation of fire sprinklers systems, and related work, in buildings and structures. Generally, the work of G&G is performed in connection with new construction, or renovation of existing buildings.

4. G&G has performed work on a number of public works projects in the State of California which are governed by the laws of California. The phrase "public works project" as used herein refers to construction projects where the owner of the works of improvement is a public

entity existing pursuant to the laws of the State of California; such as a municipality or a state university. The public entity which owns the improvements constructed on such a public works project is sometimes referred to as the "awarding body". The person who enters into a contract with the awarding body for the construction of the works of improvement is sometimes referred to as the "prime contractor". The contractors who are hired by the prime contractor for the construction sometimes are referred to as "subcontractors".

5. G&G has performed work on public works projects as both prime contractor, and subcontractor. G&G intends to continue to perform work on public works projects as both a subcontractor and prime contractor.

6. The public works projects performed by G&G include projects known as CSU, San Bernardino; Culver City, City Hall; San Joaquin General Hospital; Anaheim City Public Utilities project; Moore Hall Seismic Renovation, at University of California, Los Angeles; University Center Expansion ("U-Cen"), at University of California, Santa Barbara; Rec-Center, at University of California, Santa Barbara; and the Pyramid at California State University, Long Beach.

7. Notices to withhold have been issued by the Division of Labor Standards Enforcement, State of California ("DLSE") on account of alleged violations by G&G of California prevailing wage law on a number of projects, including CSU, San Bernardino; San Joaquin General Hospital; Culver City, City Hall; Moore Hall Seismic

Renovation, at University of California, Los Angeles; University Center Expansion ("U-Cen"), at University of California, Santa Barbara; Rec-Center, at University of California, Santa Barbara; Anaheim City Public Utilities project; and the Pyramid at California State University, Long Beach, on account of alleged violations by G&G of the California prevailing wage law. G&G disputes and denies the alleged violations. The notices to withhold were not based on complaints by G&G employees.

8. G&G has been the subject of notices to withhold by DLSE on account of alleged violations of California prevailing wage law as both a prime contractor and subcontractor. For example, G&G was a prime contractor for the Anaheim City Public Utilities project for which a notice to withhold was issued, and a subcontractor for the CSU, San Bernardino project for which a notice to withhold was issued.

9. Notices to withhold by DLSE remain pending as to the CSU, Bernardino project; Culver City, City Hall project; and San Joaquin General Hospital project. The notices to withhold on the other projects have been released. G&G disputes and denies that it committed violations of California prevailing wage law. Exhibit 2 in support of this motion is a true and accurate copy of the notices to withhold which remain pending. The aforesaid pending notices to withhold were submitted by DLSE to the awarding bodies for each of the respective projects. The awarding bodies for each of the projects have withheld money from the prime contractors on account of the notices to withhold. The prime contractors for each of the respective projects have withheld payment from G&G on account of the notices to withhold.

10. There was no hearing held to determine whether there had been any violations of the prevailing wage law, or to determine the amount of wages or penalties due, prior to the issuance of any of the aforesaid notices to withhold. G&G received no notice that the notices to withhold would be issued prior to their issuance, except that as to the San Joaquin General Hospital project G&G was informed that DLSE disputed the classification of certain workers prior to the issuance of a notice to withhold.

11. On July 17, 1995, I received a copy of a notice of penalty assessment issued by DLSE for the CSU, San Bernardino project. The notice was dated July 11, 1995, and indicated that G&G had failed to respond to a request for copies of payroll reports. Payroll reports are submitted to the awarding body and/or prime contractor on all public works projects and are public records. To my knowledge, G&G had not received any request from DLSE for payroll reports. The penalty assessment was signed by Rosa Frazier, Deputy Labor Commissioner. I sent a letter dated July 17, 1995, to Ms. Frazier, stating that G&G would provide the requested information by July 21, 1995, and requested that the penalty assessment be rescinded. On July 18, 1995, I spoke by telephone with Ms. Frazier. Ms. Frazier stated that a request for certified payroll had been mailed in June to G&G, at 10305 Jefferson Boulevard, Culver City. I explained to Ms. Frazier that G&G had moved from said address in April. I reiterated that G&G would provide the requested records by July 21, 1995, and requested that the penalty assessment be rescinded. I was advised that a decision to rescind the notice of penalty assessment must be made by Roger

Miller. DLSE did not rescind the notice of penalty assessment.

12. The above penalty assessment regarding CSU, San Bernardino was served just as G&G had negotiated for final payment on the project. As a result of the notice of penalty assessment, G&G did not receive the payment as had been agreed.

13. I received a notice to withhold on the Culver City, City Hall project by or about September 29, 1995. I had no prior notice that the notice would be issued, and had received no information as to the purported basis for the notice to withhold. I have requested that DLSE provide information as to the basis of the notice to withhold, but I have received no information. I do not believe there is a proper basis for the notice to withhold.

14. As a result of the pending notices to withhold which are attached hereto as Exhibit 2, the sum of not less than $120,000 is presently being withheld from G&G.

15. Generally the price for work by a contractor on a project, including G&G, is mostly to cover the costs of performance, such as labor and materials. The issuance of notices to withhold of the types included in Exhibit 2 has a substantial detrimental effect on G&G's ability to do business. The effect of the notice to withhold is to reduce, or cut off, payments to G&G for work performed. Inasmuch as G&G intends to perform further public works projects in the future, there is a substantial and imminent threat that the issuance of additional improper notices to withhold could impair G&G's cash flow and affect its ability to do business, even to the extent that it could no longer continue to do business. The issuance of notices to

withhold by DLSE causes damage to G&G's reputation in the industry, thereby affecting its ability to obtain and to do business.

16. I have been told by officials of DLSE, including Deputy Labor Commissioner Juan Garza, that there is no right to a hearing with regard to a notice to withhold, except the right of a prime contractor to file a lawsuit under Labor Code §§ 1731-1733.

I state the above of my own personal knowledge and if called as a witness could testify competently thereto.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed on October 16, 1995, at Los Angeles, California.

/s/ Itai Ben-Artzi
ITAI BEN-ARTZI

EXHIBIT 2A

[SEAL]

LABOR COMMISSIONER, STATE OF CALIFORNIA
Department of Industrial Relations
DIVISION OF LABOR STANDARDS ENFORCEMENT
Bureau of Field Enforcement
245 W. Broadway, Room 450
Long Beach, CA 90802
(310) 499-6303

To: CAL STATE UNIVERSITY, San Bernardino
5500 University Pkwy., #127
San Bernardino, CA 92407

Date: July 11, 1995

In Reply, Refer to Case No.: 40-PW-00363/593

NOTICE OF PENALTY ASSESSMENT

(Filed Jul. 12, 1995)

Project Contract No.	Contract No. 1264/Health, P.E., Classroom, Office Facilities SB-264R, California State University, San Bernardino
Prime Contractor	CAL-PAC CONSTRUCTION, INC.
Sub-Contractor	G & G FIRE SPRINKLERS, INC.

We have been unable to obtain certified copies of payroll records concerning the above-named project.

Pursuant to Section 1778(f) of the Labor Code, you are hereby directed to withhold $750.00, per calendar day, commencing July 1, 1995, from any and all progress payments which are now or hereafter may become due to the

contractor(s) hereinafter named. The amount due as of 7-11-95, is $8,250.00.

The withholding shall continue until you are notified to the contrary by this office.

You are hereby required, pursuant to said section to withhold any and all payments which are now or hereafter may become due to the contractor herein above named to the extent of the claim as herein above shown.

I declare under perjury as follows: I am an authorized representative acting for the State Labor Commissioner. I declare that I have read the foregoing Notice of Penalty Assessment and I have made an investigation of the facts relating thereto, and based on all the facts known to me at this time and based on all of the statements and information given to me at this time, I am informed and believe that the foregoing Notice of Penalty Assessment is true and correct, and that the facts have been found to support this Notice.

Executed on July 11, 1995, at Long Beach, California.

STATE LABOR COMMISSIONER

By /s/ Rosa Frazier
Rosa Frazier, Deputy Labor Commissioner

cc: Bonding Company
Prime Contractor
Subcontractor
RF/s

EXHIBIT 2B

STATE OF CALIFORNIA PETE WILSON, Governor

[SEAL]
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
Michael S. Villeneuve, Staff Attorney
245 West Broadway, Suite 450
Long Beach, California 90802-4445
Telephone No. (310) 590-5461
Telefax No. (310) 499-6367

SEP 15 1995

September 13, 1995 In Reply Refer To: LB0773

Jack W. Fleming, Esq. Fax No. (714) 252-0961
ARTER & HADDEN
2 Park Plaza, Suite 700
Irvine, CA 92714

Richard Ceccia, Esq. Fax No. (310) 985-2925
OFFICE OF GENERAL COUNSEL
The California State University
400 Golden Shore
Long Beach, CA
90802-4275

Re: Cal-Pac Construction, Inc. v. The Trustees of the California State University, et al.
San Bernardino County Superior Court Case No. SCV 22821

Gentlemen:

Transmitted herewith is a copy of DLSE's Notice to Withhold with respect to subcontractor G & G Fire Sprinklers, Inc. This Notice to Withhold supersedes the previous Notice of Penalty Assessment and serves as a release of the difference between the Notice to Withhold and any amount withheld in accordance with the Notice of Penalty Assessment.

This Notice to Withhold does not in any way impact the Notice to Withhold on Performance Construction.

If you have any questions, please contact the undersigned.

Very truly yours,

/s/ Michael S. Villeneuve
MICHAEL S. VILLENEUVE
Attorney for the Labor Commissioner

MSV:rst

Enclosure

[SEAL]

Labor Commissioner, State of California
Department of Industrial Relations
Division of Labor Standards Enforcement
245 W. Broadway, Room 450
Long Beach, CA 90802
(310) 499-6303

Cal State Univ., San Bernardino
P. O. Box 3502
Seal Beach, CA 90740-7502
Attn: George E. Owen, P.E. Constr. Engr.

Date: Sept. 13, 1995

In Reply, Refer to Case No.: 40-PW-00363/593

NOTICE TO WITHHOLD

PROJECT NAME Health, P E, Classroom, Office Fac.

PROJECT CONTRACT NO. 1264

PRIME CONTRACTORCal-Pac Construction, Inc.

SUB-CONTRACTOR G & G Fire Sprinklers, Inc.

Enclosed are a NOTICE OF WAGES OWED and NOTICE OF PENALTY ASSESSMENT pertaining to the above-named project.

You are directed to withhold and retain from any payments due the general contractor the total amount of $23,121.28 which is the sum of all wages and penalties forfeited pursuant to the provisions of Labor Code Section 1727 as evidenced by the attached Notice of Wages Owed and Notice(s) of Penalty Assessment.

If you receive notice of a suit filed by the contractor to recover the prevailing wages and/or the Penalties Labor Code Section 1731 requires you retain the above stated sum pending the outcome of the suit. If no such notice of suit is received within the 90 day period after cessation, acceptance, or completion of the project, all monies withheld shall be remitted to this office. If within the aforementioned period, the contractor consents in writing with the Notice of Wages Owed and/or Notice of Penalty Assessment, the amount withheld shall be remitted to this office.

I declare under penalty of perjury as follows: I am an authorized representative acting for the State Labor Commissioner. I execute this Declaration on behalf of the workers whose names are set forth on the attached notices. I have read the foregoing Notice to Withhold and I have made an investigation of the facts relating thereto, and based on all the facts known to me at this time and based on all of the statements and information given to me at this time, I am informed and believe that the foregoing Notice to Withhold is true and correct, and that the facts have been found to support this Notice.

Sincerely,

STATE LABOR COMMISSIONER

By /s/ Rosa Frazier
Rosa Frazier
Long Beach
PW 13

Labor Code Section 1731. If suit is brought against the awarding body within the 90-day period either by service of summons or by registered mail which is received

within the outcome of the suit, and be forwarded to the State Treasurer only in the event of a final court judgment against the contractor or his assignee. Otherwise the penalties and forfeitures are subject to any final judgment which is obtained by the contractor or his assignee. Otherwise, the penalties and forfeitures are subject to any final judgment which is obtained by the contractor or his asignee.

Date: September 13, 1995
#40-PW-00363/593

Dear Awarding Agency:

This memo is to advise that there is no provision in the Labor Code for "bonding around" a Notice to Withhold issued by the DIVISION OF LABOR STANDARDS ENFORCEMENT (DLSE).

The statutory provisions for bonding around liens are found in the Civil Code. The DLSE is not subject to the Civil Code but rather is governed by the Labor Code. See *Krueger Brothers v. San Francisco Housing Authority* (1988) 243 Cal.Rptr 585, 198 Cal App 3d 1.

There is a statutory scheme within the Labor Code which sets such a high priority on payment of wages to workers that certain Labor Code provisions enable the DLSE to enforce proper payment of wages and penalties by *mandating* that the awarding body withhold *funds* set out in the Notice to Withhold (Labor Code §1727).

The priority placed on payment of wages can be found in the last paragraph of Labor Code §1775 which

clearly states that from out of any money withheld or recovered there shall first be paid the wages due each workman.

The statutory scheme, as set out in Labor Code §§1720-1861, does not intend that DLSE enter into litigation with a Bonding Company to obtain wages and penalties which are mandated to be withheld by the awarding body. The language of Labor Code §1727 clearly states that the awarding body *"shall withhold and retain"* funds pursuant to a contract for public works. This language makes no provision for a bond. A bond is not the same thing as the awarding body retaining all funds.

Labor Code §1730 clearly mandates that the awarding body shall forward *funds* withheld pursuant to a Notice to Withhold directly to DLSE ninety (90) days after completion of the contract if no suit is filed during that time by the prime contractor. In the event the prime contractor files suit within the time frame allowed, Labor Code §1731 mandates that the *funds shall be retained* by the awarding body pending the outcome of the suit.

If the funds are not withheld by the awarding body pursuant to the Notice to Withhold but are "bonded around", then there are no *funds* to forward to DLSE per Labor Code §1730, or to *retain*, pending any suit, per Labor Code §1731.

Nowhere in the above statutory scheme is there any provision for "bonding around" the withheld funds. The only mention or provision regarding bonding in the Labor Code is for a *cash* bond allowed in Labor Code §1728 which is restricted to cases of contracts with assessment or improvement districts.

Labor Commissioner, State of California
Department of Industrial Relations
Division of Labor Standards Enforcement
245 W. Broadway, Room 450
Long Beach, Ca 90802
(310) 499-6303

[SEAL]

Cal State Univ., San Bernardino
P. O. Box 3502
Seal Beach, CA 90740-7502
Attn: George E. Owen, P.E. Constr. Engr.

Date: September 13, 1995 In Reply, Refer to Case No: 40-PW-00363/593

NOTICE OF WAGES OWED

PROJECT NAME
Health, P E, Classroom, Office Fac.

PROJECT CONTRACT NO. 1264

PRIME CONTRACTOR
Cal-Pac Construction, Inc.
SUB-CONTRACTOR
G & G Fire Sprinklers, Inc.

Please take notice that the person(s) named on Exhibit "A", attached hereto and made a part hereof, have performed labor as stated on Exhibit "A" for the sub-contractor or general contractor, named above, or other person(s) acting by your authority on the work of improvement in progress or being completed at your property at the project shown above.

Total value of the labor so performed is the sum of $_____ TO BE DETERMINED _____, and no payments have been made for the foregoing labor except as

indicated on Exhibit "A", and there now remains due, owing and unpaid $1,771.28 after deducting all just credits and offsets. The labor was performed for and furnished to the above named general contractor on the above named project.

This Notice is given pursuant to the provisions of section 1727 of the Labor Code. You are hereby required pursuant to said section nto [sic] wjthhold any and all payments which are or hereafter may become due to the contractor hereinabove named to the extent of the total claim as hereinabove shown.

Executed on September 13, 1995, at Long Beach, CALIFORNIA.

STATE LABOR COMMISSIONER

By /s/ Rosa Frazier
Rosa Frazier
Long Beach

PW14

EXHIBIT 11

005

PUBLIC WORKS AUDIT WORKSHEET

EMPLOYER/FIRM			DEPUTY	OFFICE	TOTAL AMT
G & G Fire Sprinklers, Inc.			Rosa Frazier	Long Beach	312
ADDRESS	CITY		TRANSCRIBER		WAGES DU
5965 Washington Bl.	Culver City, CA 90232				1731
PROJECT	AWARDING BODY	PRIME	AUDIT NUMBER/CASE NUMBER		PENALTIES
Health, P E, Classroom, Cal	St Univ., San Bernardino	Cal-Pac Construction, In	40-PW-00363/593		1351
					TRAINING F
					3

EMPLOYEE	CLASSIFICATION	PERIOD WORKED	HOURS WORKED ST.	OT.	D.T.	OTHER WAGES PAID	TOTAL WAGES PAID	PREVAILING WAGE REQUIREMENTS OTHER	TOTAL WAGES	AMOUNT OWING AND UNPAID	PENALTIES NO.1	PENALTIES NO. 2
Shlomi Ifrah	Spnklr Fitter		52.5	0	0	19.58	1477.51	0.00	1761.38	283.87	550.00	(
Allen M. Hoff	Spnklr Fitter		56	0	0	0.00	1555.12	0.00	1878.80	323.68	350.00	(
Gabriel Ybarra	Spnklr Fitter		48	0	0	120.00	600.00	0.00	1610.40	1010.40	300.00	(
Hen Hatzroni	Spnklr Fitter		21	0	0	0.00	583.17	0.00	704.55	121.38	150.00	(
			0	0	0	0.00	0.00	0.00	0.00	0.00	0.00	(

Labor Commissioner, State of California
Department of Industrial Relations
Division of Labor Standards Enforcement
245 W. Broadway, Room 450
Long Beach, Ca 90802
(310) 499-6303

[SEAL]

Cal State Univ., San Bernardino
P. O. Box 3502
Seal Beach, CA 90740-7502
Attn: George E. Owen, P.E. Constr. Engr.

Date: September 13, 1995 In Reply, Refer to Case No: 40-PW-00363/593

NOTICE OF PENALTY ASSESSMENT

PROJECT NAME	PROJECT CONTRACT NO.
Health, P E, Classroom, Office Fac.	1264

PRIME CONTRACTOR
Cal-Pac Construction, Inc.
SUB-CONTRACTOR
G & G Fire Sprinklers, Inc.

This office has determined that the above-named contractor(s) has failed to pay the prevailing wages as required by Labor Code Sections 1774 and 1815 to laborers and/or mechanics engaged in the execution of the above public works contract. Therefore, the following assessment is made as per Labor Code Sections 1775 and 1813:

27 Penalties for straight time work paid at less than the prevailing wage rate at $50.00 per worker per day per violation equals $1,350.00

__0__ Penalties for overtime work paid at less than the prevailing wage rate at $25.00 per worker per day per violation equals $0.00.

800 Penalties for failure to keep and/or furnish required payroll records at $25.00 per worker per day per violation equals $20,000.00

827 Total number of violations. Total sum due $21,350.00

This notice is given pursuant to the provisions of Section 1727 of the Labor Code. You are hereby required, pursuant to said section to withhold any and all payments which are now or hereafter may become due to the contractor hereinabove named to the extent of the total claim as hereinabove shown.

Executed on September 13, 1995 at Long Beach, California.

STATE LABOR COMMISSIONER

By /s/ Rosa Frazier
Rosa Frazier
Long Beach
PW 16

cc: Prime Contractor
Subcontractor
Bonding Company

Labor Commissioner, State of California
Department of Industrial Relations
Division of Labor Standards Enforcement
245 W. Broadway, Room 450
Long Beach, Ca 90802
(310) 499-6303

[SEAL]

CAL-PAC CONSTRUCTION, INC.
6076 Bristol Pkwy., Ste. 106
Culver City, CA 90230

Attn: Anthony J. Espinoza, Sr.
Vice President

Date: September 13, 1995 In Reply, Refer to Case No: 40-PW-00363/593

Notice of Payment Due

PROJECT NAME
Health, P E, Classroom, Office Facilities
PRIME CONTRACTOR
Cal-Pac Construction, Inc.
SUB-CONTRACTOR
G & G Fire Sprinklers, Inc.

PROJECT CONTRACT NO. 1264

This Division has completed an investigation into the payment of wages to employees of the contractor named above while employed on the above Public Works Project. The investigation revealed the following violations of the California Labor Code by contractor:

1. $ 1,739.33 Wages determined to be due based on the failure of the contractor to pay the prevailing wage and/or for the actual number of hours worked by employees on the job. Labor Code Section 1774.

2. $ 1,350.00 Penalty due for paying less than the stipulated prevailing rates. 27 Violations at $

50.00 per violation. Labor Code Section 1775.

3. $20,000.00 Penalty due for failure to keep and/or furnish required payroll records. 800 Violations at $25.00 per violation. Labor Code section 1776 (g).

4. $_____ Penalty due for failure to comply with working hours requirements. Violations at $25.00 per violation. Labor Code Section 1813.

5. $ 31.95 Training fund contributions determined to be due. Classification/Worker Fire Sprinkler Fitter.

6. TOTAL AMOUNT DUE AND PAYABLE. $23,121.28

Demand is hereby made for the total amount as shown above. Payment shall be expected within ten days. If these amounts are disputed, advise this office in writing within ten days as to the basis of the dispute and remit any amounts you concede to be due.

This letter also constitutes a notice to cease and desist violations previously noted.

Continued violations of this type will result in additional unpaid wages becoming due and additional penalties assessed under Labor Code Sections 1775, 1776, and 1813.

STATE LABOR COMMISSIONER

By /s/ Rosa Frazier
Rosa Frazier
Deputy Labor
Commissioner
PW 17
RF/s

cc: Subcontractor
Bonding Company
Awarding Body

EXHIBIT 2C

LABOR COMMISSIONER STATE OF CALIFORNIA
Department of Industrial Relations
Department of Labor Standards Enforcement
BUREAU OF FIELD ENFORCEMENT
~~COUNTY BROADWAY, SUITE 9029~~
6150 Van Nuys Bl. #100
LOS ANGELES, CA ~~90012~~ 91401
~~[illegible]~~ (818) 901-5697

[SEAL]

AWARDING BODY:

City of Culver City
c/o JCM Group
10866 Wilshire Bl. #600
Los Angeles, CA 90024-4303

IN REPLY, REFER TO CASE NUMBER:
9-22-95 40-00858/189

NOTICE TO WITHHOLD

[ILLEGIBLE] NAME/CONTRACT NUMBER
City Hall – Culver City/Project No. R-4004

CONTRACTOR
Huber, Hunt & Nichols, Inc.

CONTRACTOR
G & G Fire Sprinklers, Inc.

Enclosed are a NOTICE OF WAGES OWED and NOTICE OF PENALTY ASSESSMENT pertaining to the above-named project.

You are directed to withhold and retain from any payments due the general contractor the total amount of $48,314.64, which is the sum of all wages and penalties

forfeited pursuant to the provisions of Labor Code Section 1727 as evidenced by the attached Notice of Wages Owed and Notice(s) of Penalty Assessment.

If you receive notice of a suit filed by the contractor to recover the prevailing wages and/or the Penalties, Labor Code Section 1731 requires you retain the above stated sum pending the outcome of the suit. If no such notice of suit is received within the 90 day period after cessation, acceptance, or completion of the project, all monies withheld shall be remitted to this office. If within the aforementioned period, the contractor consents in writing with the Notice of Wages Owed and/or Notice of Penalty Assessment, the amount withheld shall be remitted to this office.

I declare under penalty of perjury as follows: I am an authorized representative acting for the State Labor Commissioner. I execute this Declaration on behalf of the workers whose names are set forth on the attached notices. I have read the foregoing Notice to Withhold and I have made an investigation of the facts relating thereto, and based on all the facts known to me at this time and based on all of the statements and information given to me at this time. I am informed and believe that the foregoing Notice to Withhold is true and correct, and that the facts have been found to support this Notice.

Sincerely,

STATE LABOR COMMISSIONER

By /s/ Larry Loughlin
Larry Loughlin, LSI

LABOR COMMISSIONER, STATE OF CALIFORNIA
Department of Industrial Relations
DIVISION OF LABOR STANDARDS ENFORCEMENT
Bureau of Field Enforcement
~~[illegible] South Broadway, Rm 5029~~
6150 Van Nys Bl. #100
Los Angeles, CA ~~90012~~ 91401
(818) 901-5697

TO:
City of Culver city
c/o JCM Group
10866 Wilshire Bl. #600
Los Angeles, CA 90024-4303

DATE: 9-22-95 In Reply, Refer to Case Number: 40-00858/189

[SEAL]

NOTICE OF WAGES OWED

Contract Number No. R-4004

Sub-Contractor
G & G Fire Sprinklers, Inc.

General Contractor
Huber, Hunt & Nichols, Inc.

Project Name and Adress
City Hall – Culver City

Please take notice that the person(s) named on Exhibit "A", attached hereto and made a part hereof, have performed labor as stated on Exhibit "A" for the sub-contractor or general contractor, named above, or other person(s) acting by your authority on the work of improvement in progress or being completed at your property at the project shown above.

Total value of the labor so performed is the sum of $41,514.64, and no payments have been made for the foregoing labor except as indicated on Exhibit "A", and there now remains due, owing and unpaid $41,514.64 after deducting all just credits and offsets. The labor was performed for and furnished to the above named general contractor on the above named project.

This Notice is given pursuant to the provisions of section 1727 of the Labor Code. You are hereby required pursuant to said section to withhold any and all payments which are or hereafter may become due to the contractor hereinabove named to the extent of the total claim as hereinabove shown.

Executed on 9-22-, 1995, at Van Nuys, California

STATE LABOR COMMISSIONER

By /s/ Larry Loughlin
Larry Loughlin, LSI

LABOR COMMISSIONER STATE OF CALIFORNIA
Department of Industrial Relations
Division of Labor Standards Enforcement
BUREAU OF FIELD ENFORCEMENT
~~[illegible] BROADWAY, SUITE 5029~~
6150 Van Nuys Bl. #100
Los Angeles, CA ~~90012~~ 91401
(818) 901-5697

[SEAL]

WARDING BODY:
City of Culver City
c/o JCM Group
10866 Wilshire Bl. #600
Los Angeles, CA 90024-4303

DATE: 9-22-95 IN REPLY, REFER TO CASE NUMBER:
40-00858/189
[SEAL]

NOTICE OF PENALTY ASSESSMENT

NAME / CONTRACT NUMBER
City Hall – Culver City / No. R-4004

CONTRACTOR
Huber, Hunt & Nichols, Inc.

SUB-CONTRACTOR
G & G Fire Sprinkler, Inc.

This office has determined that the above-named contractor(s) has failed to pay the prevailing wages as required by Labor Code Sections 1774 and 1815 to laborers and/or mechanics engaged in the execution of the above public works contract. Therefore, the following assessment is made as per Labor Code Sections 1775 and 1813:

136 Penalties for straight time work paid at less, than the prevailing wage rate at ~~$25.00~~ 50.00 per worker per day per violation equals $6800.00.

___ Penalties for overtime work paid at less than the prevailing wage rate at $25.00 per worker per day per violation equals $_____.

136 Total number of violations

Total sum due $6800.00.

This Notice is given pursuant to the provisions of Section 1727 of the Labor Code. You are hereby required, pursuant to said section to withhold any and all payments which are or hereafter may become due to the contractor herein above named to the extent of the total claim as hereinabove shown.

Executed on 9-22, 1995, at Van Nuys, California.

STATE LABOR COMMISSIONER

By /s/ L Loughlin
Larry Loughlin, LSI

cc: Prime Contractor
Subcontractor
Bonding Company

P.S.17

FIRM	EMPLOYEE	SOCIAL SECURITY NUMBER	TOTAL WAGES DUE
G + G Fire Sprinklers	UNKNOW Employess		
ADDRESS	ADDRESS (NOT SHOWN ON CPR's)	PERIOD FROM: Beginning THROUGH: Completion	MINIMUM WAGES DUE
(NOTE: 1 WORKER = 8 HOURS)	Culver City City Hall Project	TRANSCRIBER AND DATE	OTHER WAGES DUE
	EXHIBIT "A"	EMPLOYEE'S OCCUPATION: Sprinklers Fitter	OVERTIME PAY DUE

PERIOD ENDING	HOURS WORKED (S—Split Shift) M	T	W	Th	F	S	S	TOTAL HOURS REG	O/T	OTHER	TOTAL	RATE OF PAY	WAGES PAID REG	O/T	OTHER	TOTAL	REQUIRED WAGES REG	O/T	OTHER	TOTAL	ADJUSTMENT DUE
	4	5	6	7	8	9	10														
+-8.94			8	8	8						24	37.96									911.04
	11	12	13	14	15	16	17														
4-16	8	16	16	8	8						56										2125.76
	18	19	20	21	22	23	24														
4-22	8	9	16								32										1214.72
	9	10	11	12	13	14	15														
5-14			16								16										607.36
	16	17	18	19	20	21	22														
5.21				8	8						16										607.36
	23	24	25	26	27	28	29														
5-28	8	16									24										911.04
	6	7	8	9	10	11	12														
6-11		8		8							16										607.36
	13	14	15	16	17	18	19														
6-18		8	8	8	16						40										1518.40
	20	21	22	23	24	25	26														
6.-25	8	8	8	8	8						40										1518.40
	27	28	29	30	1	2	3														
7-2-94	8	8	8	8	8						40	37.96									1518.40

BEST AVAILABLE COPY

P.D.I.

FIRM	EMPLOYEE	SOCIAL SECURITY NUMBER		TOTAL WAGES DUE
ADDRESS	ADDRESS	PERIOD FROM	THROUGH	MINIMUM WAGES DUE
		TRANSCRIBER AND DATE		OTHER WAGES DUE
		EMPLOYEE'S OCCUPATION		OVERTIME PAY DUE

PERIOD ENDING	HOURS WORKED S—Split Shift							TOTAL HOURS				RATE OF PAY	WAGES PAID				REQUIRED WAGES				ADJUSTMENT DUE
	M	T	W	Th	F	S	S	REG	O/T	OTHER	TOTAL		REG	O/T	OTHER	TOTAL	REG	O/T	OTHER	TOTAL	
	4	5	6	7	8	9	10					51.345									
1-9-94			8			16		8	16		24	37.96					303.68	821.52			1125.20
	25	26	27	28	29	30	31														
7-29	8			8							16	37.96									607.36
	8	9	10	11	12	13	14														
8-12		8	8	8	8						32										1214.72
	15	16	17	18	19	20	21														
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	22	23	24	25	26	27	28														
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	19	20	21	22	23	24	25														
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10-21-94	8			24	8						40	37.96									1518.40

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P.7/7

FIRM	EMPLOYEE	SOCIAL SECURITY NUMBER	TOTAL WAGES DUE
ADDRESS	ADDRESS	PERIOD FROM / THROUGH	MINIMUM WAGES DUE
		TRANSCRIBER AND DATE	OTHER WAGES DUE
		EMPLOYEE'S OCCUPATION	OVERTIME PAY DUE

PERIOD ENDING	HOURS WORKED (S—Split Shift) M	T	W	Th	F	S	S	TOTAL HOURS REG	O/T	OTHER	TOTAL	RATE OF PAY	WAGES PAID REG	O/T	OTHER	TOTAL	REQUIRED WAGES REG	O/T	OTHER	TOTAL	ADJUSTMENT DUE
	24	25	26	27	28	29	30														
10-28-94	24	24	24	24	24						120	37.96									4555.20
	31	11/1	2	3	4	5	6														
11-4	16	16	8								40										1518.40
	14	15	16	17	18	19	20														
11-18					8						8										303.68
	21	22	23	24	25	26	27														
11-25-94	8										8										303.68
	16	17	18	19	20	21	22														
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	30	31	2/1	2	3	4	5														
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5-19-95		8		8	16						32	37.96									1214.72
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EXHIBIT 2D

LABOR COMMISSIONER, STATE OF CALIFORNIA
Department of Industrial Relations
DIVISION OF LABOR STANDARDS ENFORCEMENT
Bureau of Field Enforcement
2424 Arden Way, Suite 340
Sacramento, CA 95825

[SEAL]

TO:

Stephen Keeter, Project Manager
County of San Joaquin,
Capital Projects Division
222 East Weber Ave.,
Courthouse Room 678
Stockton, CA 9520-2778

DATE: March 22, 1995 In Reply, Refer to Case Number: 32-16679/595

NOTICE OF WAGES OWED

Contract Number
R-93-622

Sub-Contractor
G&G Fire Sprinklers, Inc.

General Contractor
Perini Building Company, Inc.

Project Name and Adress
San Joaquin General Hospital Replacement
Phase 1B

Please take notice that the person(s) named on Exhibit "A", attached hereto and made a part hereof, have performed labor as stated on Exhibit "A" for the sub-contractor or general contractor, named above, or other

person(s) acting by your authority on the work of improvement in progress or being completed at your property at the project shown above.

Total value of the labor so performed is the sum of $139,777.08, and no payments have been made for the foregoing labor except as indicated on Exhibit "A", and there now remains due, owing and unpaid $71,317.08 after deducting all just credits and offsets. The labor was performed for and furnished to the above named general contractor on the above named project.

This Notice is given pursuant to the provisions of section 1727 of the Labor Code. You are hereby required pursuant to said section to withhold any and all payments which are or hereafter may become due to the contractor hereinabove named to the extent of the total claim as hereinabove shown.

Executed on March 22, 1995, at Sacramento, California

STATE LABOR COMMISSIONER

By /s/ Daniel Dellarocca
Daniel Dellarocca,
Deputy Labor Commissioner

RECEIVED
MAR 24 1995
PERINI CORP
NOTICE OF WAGES OWED

LABOR COMMISSIONER, STATE OF CALIFORNIA
Department of Industrial Relations
Division of Labor Standards Enforcement
Bureau of Field Enforcement
2424 Arden Way, Suite 340
Sacramento, CA 95825

AWARDING BODY: [SEAL]
Stephen Keeter, Project Manager
County of San Joaquin,
Capital Projects Div.
222 East Weber Ave.,
Courthouse Room 678
Stockton, CA 95202-2778

DATE: March 22, 1995 IN REPLY, REFER TO CASE NUMBER:
32-16679/595

NOTICE OF PENALTY ASSESSMENT

PROJECT NAME / CONTRACT NUMBER
San Joaquin General Hospital Replacement Phase 1B

PRIME CONTRACTOR
Perini Building Company, Inc.

SUB-CONTRACTOR
G&G Fire Sprinklers, Inc.

This office has determined that the above-named contractor(s) have failed to pay the prevailing wages as required by Labor Code Sections 1774 and 1815 to laborers and/or mechanics engaged in the execution of the above public works contract. Therefore, the following assessment is made as per Labor Code Sections 1775 and 1813:

451 Penalties for straight time work paid at less, than the prevailing wage rate at ~~$XXXX~~ 50.00 per worker per day per violation equals $22,550.00.

___ Penalties for overtime work paid at less than the prevailing wage rate at $25.00 per worker per day per violation equals $_____.

451 Total number of violations

Total sum due $22,550.00.

This Notice is given pursuant to the provisions of Section 1727 of the Labor Code. You are hereby required, pursuant to said section to withhold any and all payments which are or hereafter may become due to the contractor herein above named to the extent of the total claim as hereinabove shown.

Executed on March 22, 1995, at Sacramento, California.

STATE LABOR COMMISSIONER

By /s/ Daniel Dellarocca
Daniel Dellarocca,
Deputy Labor Commissioner

cc: Prime Contractor
Subcontractor
Bonding Company

EXHIBIT 3

DECLARATION OF STEPHEN A. SEIDEMAN

I, Stephen A. Seideman, declare:

1. I am an attorney licensed to practice in the State of California, and am admitted to practice in the United States District Court, Central District of California. I am an associate of Levin, Stein, Chyten & Schneider, attorney of record for Plaintiff in this action.

2. Exhibit 4 in support of this motion is a true and accurate copy of excerpts from the transcript of the deposition of Roger D. Miller, volume I. The deposition was taken on December 8, 1994, before a certified court reporter. I was present during the deposition, and conducted the questioning of the witness. The transcripts accurately set forth what was said at the deposition.

3. Exhibit 5 in support of this motion is a true and accurate copy of excerpts from the transcript of the deposition of Roger D. Miller, Volume II. The deposition was taken on January 19, 1995, before a certified court reporter. I was present during the deposition, and conducted the questioning of the witness. The transcripts accurately set forth what was said at said deposition.

4. Exhibit 6 in support of this motion is a true and accurate copy of excerpts from the transcript of the deposition of Juan Garza. The deposition was taken on June 7, 1994, before a certified court reporter. I was present during the deposition, and conducted the questioning of the witness. The transcripts accurately set forth what was said at said deposition.

5. I have practiced civil litigation in state courts in California for over ten years. I am personally familiar with the amount of time it takes to litigate a civil case in said courts, at both the trial and appellate level. Presently, it generally takes from one to two years from filing of a complaint until trial. The scheduling of trials is dependent on the court's calendar, and may sometimes take longer. For example, there has been much speculation that the "three strikes" criminal law may increase the time it takes for civil cases to get to trial. At the appellate level, cases before the Court of Appeal are typically pending from one to two years before a decision is rendered.

6. Attached hereto as Exhibit 7 is a true and accurate copy of a letter I sent requesting information as to the basis of the notice to withhold issued as to G&G for the CSU, San Bernardino project. I did not receive a response to the letter.

7. Attached hereto as Exhibit 8 is a copy of a letter dated August 28, 1995, from Jack Fleming, attorney for the prime contractor on CSU, San Bernardino, to DLSE, and a copy of a letter dated August 22, 1995, from the awarding body (i.e., the University) to CAL-PAC.

I state the above of my own personal knowledge and if called as a witness could testify competently thereto.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this Declaration was executed on October 16, 1995, at Los Angeles, California.

/s/ Illegible
STEPHEN A. SEIDEMAN

EXHIBIT 4

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

G & G FIRE SPRINKLERS, INC., PLAINTIFF, VS. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, A CORPORATION, DEFENDANT.	CASE NO. BC104623 VOLUME I

DEPOSITION OF ROGER D. MILLER

LOS ANGELES, CALIFORNIA

DECEMBER 8, 1994

* * *

[7] LOS ANGELES, CALIFORNIA; THURSDAY, DECEMBER 8, 1994; 10:20 A.M.

* * *

ROGER D. MILLER,
HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

* * *

EXAMINATION

BY MR. SEIDEMAN:

Q COULD YOU STATE YOUR NAME FOR THE RECORD, PLEASE.

A ROGER D. MILLER.

Q MR. MILLER, BY WHOM ARE YOU PRESENTLY EMPLOYED?

A STATE OF CALIFORNIA, DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF LABOR STANDARDS.

Q MR. MILLER, HAVE YOU EVER TESTIFIED AT A DEPOSITION BEFORE?

A YES, I HAVE.

Q ON HOW MANY OCCASIONS?

A I DON'T RECALL, BUT SEVERAL.

Q SO ARE YOU GENERALLY FAMILIAR WITH THE DEPOSITION PROCEDURE?

A YES, I AM.

* * *

[10] COMMISSIONER III.

Q AND WHERE IS YOUR OFFICE LOCATED?

A VAN NUYS, 6150 VAN NUYS BOULEVARD, ROOM 200, VAN NUYS, 91401.

Q HOW LONG HAVE YOU BEEN EMPLOYED AS A SENIOR DEPUTY LABOR COMMISSIONER III?

A AT THIS TIME APPROXIMATELY ONE YEAR.

Q WHAT WAS YOUR POSITION PRIOR TO THAT?

A I WAS A DEPUTY IV.

Q AND BY GOING FROM A DEPUTY IV TO A DEPUTY III, DID YOUR DUTIES CHANGE AT ALL?

A YES, IT DID.

Q WHAT ARE YOUR CURRENT DUTIES?

A MY CURRENT DUTIES IS RESPONSIBILITY FOR THE ENFORCEMENT OF THE PUBLIC WORKS LAWS FOR SOUTHERN CALIFORNIA, SUPERVISING THE STAFF FOR PUBLIC WORKS ENFORCEMENT.

Q AND HAVE YOU HAD THOSE DUTIES SINCE THE TIME THAT YOU BECAME SENIOR DEPUTY LABOR COMMISSIONER III?

A YES, I HAVE.

Q WHAT WERE YOUR DUTIES IMMEDIATELY PRIOR TO THAT POSITION?

A I HAD RESPONSIBILITY FOR ALL ENFORCEMENT OF THE PUBLIC WORKS LAWS, LABOR CODE, IWC ORDERS FOR SOUTHERN CALIFORNIA.

* * *

[13] TARGETING CERTAIN INDUSTRIES.

Q DID THAT INVOLVE PUBLIC WORKS?

A NO, IT DID NOT ORIGINALLY.

Q AND THEN PRIOR TO THAT, YOU WERE A HEARING OFFICER FOR TWO YEARS; IS THAT CORRECT?

A THAT'S CORRECT.

Q COULD YOU DESCRIBE GENERALLY WHAT A HEARING OFFICER DOES?

A WELL, BASICALLY, THEY HEAR CASES ON WAGE CLAIMS HAVING TO MAKE A DECISION.

Q SO IN OTHER WORDS, FOR EXAMPLE, IF AN EMPLOYEE SAID THAT AN EMPLOYER HADN'T PAID HIM HIS WAGES, THAT TYPE OF THING?

A YES.

Q AND THEN FOR SIX OR SEVEN YEARS YOU WERE A DEPUTY I OR A FIELD AGENT; IS THAT RIGHT?

A CORRECT.

Q WHAT DID THAT INVOLVE AS FAR AS DUTIES?

A DOING ALL THE INVESTIGATION. IT'S FIELD WORK, GOING OUT, ENFORCING ALL THE STATE LABOR LAWS.

Q DID THAT INCLUDE ANY PUBLIC WORKS?

A YES, IT DID.

Q AND DID THAT INCLUDE PREVAILING WAGE ISSUES RELATING TO PUBLIC WORKS?

A YES, IT DID.

* * *

[15] A A MONTH, TWO MONTHS? A MONTH OR TWO MONTHS.

Q PRIOR TO THAT AND SINCE YOU BECAME THE SENIOR DEPUTY LABOR COMMISSIONER, WAS ANYONE ELSE IN THE POSITION OF REGIONAL MANAGER?

A NO.

Q DURING THE 10 OR 11 MONTHS PRIOR TO MR. SMITH TAKING THAT POSITION OF REGIONAL MANAGER, WHO WAS YOUR IMMEDIATE SUPERVISOR?

A SIMON REYES.

Q AND WHAT IS HIS POSITION?

A ASSISTANT CHIEF.

Q AND THAT'S ASSISTANT CHIEF OF WHAT?

A DIVISION OF LABOR STANDARDS.

Q DO YOU KNOW HOW LONG HE'S HAD THAT POSITION?

A PROBABLY EIGHT OR NINE YEARS.

Q AND SO AT LEAST FOR THE LAST EIGHT OR NINE YEARS DURING THE TIME YOU WERE REGIONAL MANAGER, WAS MR. REYES YOUR IMMEDIATE SUPERVISOR?

A YES, HE WAS.

Q AND DO YOU KNOW WHO HIS IMMEDIATE SUPERVISOR IS?

A WELL, HE ANSWERS TO THE LABOR COMMISSIONER.

[16] Q AND THAT IS WHO?

A VICTORIA BRADSHAW.

Q DO YOU KNOW HOW LONG SHE HAS BEEN LABOR COMMISSIONER?

MR. SMITH: THREE.

THE WITNESS: THREE YEARS.

BY MR. SEIDEMAN:

Q AND THE LABOR COMMISSIONER IS THE HEAD OF THE DIVISION OF LABOR STANDARDS ENFORCEMENT?

A THAT'S CORRECT.

Q IS THERE A DIFFERENCE BETWEEN THE OFFICE OF THE LABOR COMMISSIONER AND THE DIVISION OF LABOR STANDARDS ENFORCEMENT?

A NO, THERE IS NOT.

Q IN OTHER WORDS, THAT'S SORT OF TWO NAMES FOR THE SAME THING?

A YES. SOME PEOPLE LIKE TO CALL IT THE LABOR COMMISSION. SOME CALL IT THE LABOR BOARD. THE OFFICIAL TITLE IS DIVISION OF LABOR STANDARDS ENFORCEMENT. THE TITLE OF THE PERSON IS THE LABOR COMMISSIONER. THAT'S THE WAY IT'S SET UP IN THE LABOR CODE.

Q NOW, WHEN THIS CHANGE IN THE STRUCTURE WAS MADE ABOUT A YEAR AGO AND THIS POSITION WAS ESTABLISHED AS THE SENIOR DEPUTY IN CHARGE OF THE PUBLIC WORKS, WERE YOU INVOLVED IN THE PROCESS AND THE DECISION MAKING OF MAKING

* * *

[33] A WELL, YOU HAVE THE BASIC LAWS AND REGULATIONS THAT PERTAIN TO PUBLIC WORKS THAT THEY'RE REQUIRED TO FOLLOW.

Q THE BASIC LAWS REFERRING TO STATUTES IN THE LABOR CODE?

A THAT'S CORRECT.

Q AND THEN THE REGULATIONS BEING THE REGULATIONS PROMULGATED PURSUANT TO THOSE STATUTES?

A THAT IS CORRECT.

Q ARE THERE ANY WRITTEN PROCEDURES OR GUIDELINES THAT ARE TO BE UTILIZED IN CONNECTION WITH THE ISSUANCE OF A NOTICE TO WITHHOLD FOR A PUBLIC WORKS PROJECT?

A THAT WOULD BE CONTAINED IN THE MANUAL, THE PUBLIC WORKS MANUAL. I'M SURE THERE WERE SOME INSTRUCTIONS PUT OUT BY MEMOS AT ONE TIME OR ANOTHER OF HOW TO HANDLE THEM, YES.

Q INSTRUCTION PUT OUT BY WHO?

A IN MEMOS.

Q AND THE MEMOS THAT YOU'RE THINKING OF, ARE THESE MEMOS FROM YOU?

A THEY COULD HAVE BEEN, YES.

Q DO YOU THINK THAT THEY COULD HAVE ALSO BEEN FROM SOMEONE ELSE?

A THEY COULD HAVE BEEN FROM SIMON REYES, [34] YES, AND THEY COULD HAVE BEEN

FROM THE SENIOR DEPUTY THAT WAS SUPERVISING THE PEOPLE AT THAT TIME.

Q DO YOU KNOW WHETHER OR NOT YOU HAVE ANY SUCH MEMOS?

A NO, I DO NOT.

Q NO, MEANING YOU DON'T HAVE THEM OR YOU DON'T KNOW WHETHER YOU HAVE THEM?

A I DON'T KNOW WHETHER I HAVE THEM.

Q DO YOU KNOW WHO WOULD HAVE SUCH MEMOS?

A IF THEY'RE AROUND, I WOULD PROBABLY HAVE THEM.

Q ARE THERE ANY OTHER WRITTEN PROCEDURES OR GUIDELINES WITH REGARD TO THE ISSUANCE OF A NOTICE TO WITHHOLD ON A PUBLIC WORKS PROJECT?

A NOT THAT I RECALL.

Q WHAT IS THE PROCEDURE THAT IS SUPPOSED TO BE FOLLOWED WITH REGARD TO THE ISSUANCE OF A NOTICE TO WITHHOLD ON A PUBLIC WORKS PROJECT?

A WOULD YOU GO INTO A LITTLE BIT MORE DETAIL WHAT TYPE YOU'RE ASKING ABOUT.

Q WELL, LET'S ASSUME THAT THERE WAS A DEPUTY LABOR COMMISSIONER THAT WAS INVESTIGATING AN ISSUE CONCERNING PAYMENT OF PREVAILING WAGES ON A PUBLIC WORKS PROJECT.

AND IF THAT DEPUTY LABOR COMMISSIONER THOUGHT THAT A NOTICE TO WITHHOLD MAY BE APPROPRIATE, WHAT IS THE [35] PROCEDURE THAT IS SUPPOSED TO BE FOLLOWED WITH REGARD TO THE ISSUANCE OF A NOTICE TO WITHHOLD?

A CURRENTLY, THEY ARE TO GET MY APPROVAL ON THE FORM PRIOR TO ISSUING A NOTICE TO WITHHOLD.

Q HOW LONG HAS THAT BEEN THE PROCEDURE?

A THE PROCEDURE'S BEEN AROUND QUITE A WHILE THAT THEY HAVE TO GET MY APPROVAL. PRIOR TO THAT, THEY WERE SUPPOSED TO GET APPROVAL FROM THE SENIOR DEPUTY.

Q AND WHEN DID IT CHANGE IN TERMS OF GETTING APPROVAL FROM YOU AS OPPOSED TO APPROVAL FROM THE SENIOR DEPUTY?

A WELL, WHEN I BECAME A SENIOR DEPUTY IN CHARGE OF PUBLIC WORKS.

Q SO THAT'S ABOUT A YEAR AGO?

A YES.

Q SO PRIOR TO THAT, THE APPROVAL WOULD BE FROM THE SENIOR DEPUTY?

A CORRECT.

Q AND HOW LONG HAD THAT BEEN THE PROCEDURE?

A FOR SEVERAL YEARS. I CAN'T GIVE YOU AN EXACT DATE.

Q WHAT'S YOUR BEST APPROXIMATION?

A PROBABLY THREE OR FOUR YEARS.

Q AND PRIOR TO THAT PERIOD OF TIME IN WHICH YOU'VE INDICATED THAT THE PROCEDURE WAS TO GET APPROVAL OF [36] THE SENIOR DEPUTY, WHAT WAS THE PROCEDURE?

A MAINLY, IT WAS UP TO THE DEPUTY TO ISSUE.

Q PRIOR TO YOUR BECOMING SENIOR DEPUTY ABOUT A YEAR AGO, HOW MANY SENIOR DEPUTIES WERE THERE?

A HANDLING PUBLIC WORKS?

Q YES.

A THREE.

Q AND THOSE WERE WHO?

A PHIL GALVEZ IN SAN DIEGO, KING CHEUNG IN LOS ANGELES, AND ED VOVERIS IN LOS ANGELES.

Q AND WERE THE DUTIES OF THESE SENIOR DEPUTIES DIVIDED UP IN SOME GEOGRAPHICAL BASIS?

A ONLY FROM THE STANDPOINT THAT GALVEZ WAS IN SAN DIEGO.

Q DID MR. GALVEZ HANDLE CASES OUTSIDE OF THE SAN DIEGO AREA?

A HE PROBABLY DID. WE TRIED TO LIMIT IT TO THAT, BUT HE PROBABLY HAD CASES OUTSIDE OF THAT.

Q DID EACH SENIOR DEPUTY HAVE SPECIFIC DEPUTY LABOR COMMISSIONERS ASSIGNED TO THAT PERSON, OR WAS IT DONE BY CASE, OR HOW WAS THAT DONE?

A IT WAS ASSIGNED BY PERSON.

Q SO, FOR EXAMPLE, A PARTICULAR DEPUTY LABOR COMMISSIONER WOULD HAVE ONE SENIOR DEPUTY THAT WOULD BE HIS OR HER SUPERVISOR?

[37] A CORRECT.

Q AND SO ON ANY CASE THAT DEPUTY LABOR COMMISSIONER WAS WORKING ON, IF HE OR SHE WENT FOR SOME APPROVAL TO THE SENIOR DEPUTY, IT WOULD ALWAYS BE THAT PARTICULAR SENIOR DEPUTY?

A WITH SOME EXCEPTIONS IF THAT SENIOR DEPUTY WASN'T AVAILABLE, BUT YES.

Q DO YOU KNOW WHO THE SENIOR DEPUTY FOR JUAN GARZA WAS?

A PHIL GALVEZ.

Q AND DO YOU KNOW FOR WHAT PERIOD OF TIME THAT WAS?

A NO, I DO NOT. WHEN HE WAS INITIALLY HIRED, HE WAS SUPERVISED BY PHIL.

Q AND WAS THAT UP UNTIL ABOUT A YEAR AGO?

A NO, BECAUSE WE HAD MADE SOME OTHER CHANGES IN THE PUBLIC WORKS UNIT.

Q AND WHEN WAS IT THAT YOU MADE THE OTHER CHANGES?

A ABOUT TWO YEARS AGO, TWO AND A HALF YEARS AGO.

Q WHAT WERE THOSE OTHER CHANGES?

A THAT WAS CONSOLIDATING THE PUBLIC WORKS TO BE HANDLED OUT OF LOS ANGELES.

Q WHEN YOU SAY "HANDLED OUT OF LOS ANGELES,"

* * *

[39] APPROVAL OF A NOTICE TO WITHHOLD FROM A SENIOR DEPUTY?

A YES.

Q WHAT WAS THAT PROCEDURE?

A THEY WERE TO BRING EITHER THE CASE FILE OR THE PERTINENT INFORMATION PERTAINING TO THE NOTICE FOR REVIEW OF THE SENIOR DEPUTY.

Q WERE THERE ANY OTHER PROCEDURES?

A IF YOU'RE TALKING PROCEDURES, SOMETIMES BECAUSE OF THE TIME RESTRAINTS AND THE PHYSICAL LOCATION, IT COULD HAVE BEEN DONE BY FAX OR IT COULD HAVE BEEN DONE BY PHONE.

Q WAS THERE ANY PARTICULAR PROCEDURES THAT THE SENIOR DEPUTY WAS TO FOLLOW IN

DETERMINING WHETHER TO APPROVE THE ISSUANCE OF THE NOTICE TO WITHHOLD?

A YOU KNOW, I DON'T KNOW WHETHER YOU WOULD CALL IT PROCEDURES, REVIEWING THE FORMAT OF THE DOCUMENTS TO MAKE SURE THAT ALL THE INFORMATION IS THERE AND TO MAKE SURE THAT THE BASIS FOR THE NOTICE TO WITHHOLD WAS ESTABLISHED.

Q WERE THERE ANY PARTICULAR GUIDELINES THAT WERE TO BE FOLLOWED BY THE SENIOR DEPUTY IN MAKING THIS REVIEW OF THE DOCUMENTS AND THE BASIS OF THE NOTICE TO WITHHOLD?

A NO.

Q WAS THERE ANY PARTICULAR STANDARD THAT WAS [40] TO BE APPLIED BY THE SENIOR DEPUTY IN DETERMINING WHETHER THERE WAS SUFFICIENT BASIS FOR A NOTICE TO WITHHOLD?

A IT WAS HANDLED ON INDIVIDUAL CASES.

Q WHAT DO YOU MEAN BY THAT?

A THAT EACH CASE WAS SEPARATE AS TO WHAT THE FACTS WERE ON THAT PARTICULAR CASE.

Q WERE THERE ANY OTHER PARTICULAR GUIDELINES OR PROCEDURES THAT YOU INSTRUCTED THE SENIOR DEPUTIES THEY WERE TO FOLLOW IN DETERMINING WHETHER TO APPROVE THE ISSUANCE OF A NOTICE TO WITHHOLD?

MR. VILLENEUVE: OBJECTION. ASKED AND ANSWERED.

BY MR. SEIDEMAN:

Q YOU CAN ANSWER THAT. OBJECTIONS ARE FOR THE RECORD, AND MAYBE AT SOME LATER POINT THEY WILL BE RULED ON.

A REPEAT THE QUESTION.

Q OTHER THAN WHAT YOU JUST STATED, WERE THERE ANY OTHER PROCEDURES OR GUIDELINES THAT YOU INSTRUCTED ANY OF THE SENIOR DEPUTIES THEY WERE TO FOLLOW IN CONNECTION WITH THE ISSUANCE OF A NOTICE TO WITHHOLD?

A WELL, THE INSTRUCTIONS WERE TO MAKE SURE THAT THERE IS A BASIS FOR ISSUING A NOTICE TO WITHHOLD.

Q WERE THOSE INSTRUCTIONS THAT YOU GAVE TO THE SENIOR DEPUTIES?

A THEY WOULD HAVE BEEN IN INSTRUCTIONS THAT

* * *

[71] THE WITNESS: MY ANSWER TO YOU IS NO, I DID NOT.

BY MR. SEIDEMAN:

Q WITH REGARD TO THE APPROVAL OF A NOTICE TO WITHHOLD, WHETHER THE ISSUANCE OF A NOTICE TO WITHHOLD WAS APPROVED BY A SENIOR DEPUTY OR BY YOU AS REGIONAL MANAGER, WAS THERE ANY TYPE OF RECORD THAT WAS SUPPOSED TO BE KEPT CONCERNING THE APPROVAL OF THAT NOTICE TO WITHHOLD?

A THERE'S NO APPROVAL. THE FORM ITSELF, AND I'M NOT SURE EXACTLY WHAT PERIOD OF TIME IT STARTED, I INITIAL ON THE TOP AS BEING APPROVED AND PUT A DATE ON IT.

Q SO IF YOU APPROVED A NOTICE TO WITHHOLD, THE ACTUAL NOTICE ITSELF WOULD HAVE YOUR INITIALS AND A DATE ON THE TOP; IS THAT RIGHT?

A I STARTED DOING THAT, YES.

Q DO YOU KNOW WHEN YOU STARTED DOING THAT?

A NO, I DO NOT.

Q DO YOU KNOW APPROXIMATELY WHEN?

A NO, I DO NOT.

Q WAS IT BEFORE OR AFTER YOU BECAME SENIOR DEPUTY?

A I THINK IT WAS AFTER, BUT I DON'T RECALL.

Q DO YOU KNOW WHETHER THERE WAS ANY PROCEDURE FOLLOWED BY OTHER SENIOR DEPUTIES FOR DOCUMENTING APPROVAL OF A NOTICE TO WITHHOLD?

A NO, I DO NOT.

* * *

[149] ONES YOU SHOULD KNOW ABOUT?

A NO, HE DID NOT.

Q WELL, HAVING LOOKED AT WHAT YOU'VE LOOKED AT AND GONE THROUGH THE DISCUSSION

THAT YOU'VE HAD, IS THERE ANYTHING NOW THAT YOU REMEMBER ABOUT G & G AND THE INVESTIGATIONS OF G & G AND SO FORTH THAT YOU DIDN'T REMEMBER BEFORE?

A NOT ANY PARTICULAR ITEM, NO.

Q YOU'RE AWARE THAT THERE ARE NOTICES TO WITHHOLD THAT WERE ISSUED ON SEVERAL PROJECTS REGARDING G & G?

A YES, I AM.

Q APPROXIMATELY HOW MANY OTHER CONTRACTORS ARE THERE IN THE LAST YEAR WHERE YOU'VE BEEN INVOLVED IN APPROVING NOTICES TO WITHHOLD ON SEVERAL PROJECTS?

A SEVERAL HUNDRED.

Q AND WOULD YOU SAY THAT THERE ARE CERTAIN OF THOSE CASES THAT YOU WOULD BE MORE INVOLVED IN AND HAVE A BETTER RECOLLECTION OF THAN OTHERS?

A THERE ARE SOME, YES.

Q BUT APPARENTLY, THE G & G CASE IS NOT ONE OF THOSE?

A NO. I TOLD YOU I DON'T REMEMBER ANY PARTICULAR DISCUSSIONS. I REMEMBER A LOT OF DISCUSSIONS REGARDING G & G, YES.

* * *

[179] Q BUT DON'T YOU HAVE TO MAKE SOME JUDGMENT OF WHETHER THERE'S A VIOLATION OF THE LAW?

A WE'VE ISSUED THE NOTICE TO WITHHOLD BASED UPON THE INVESTIGATION OF THE DEPUTY.

Q DO YOU YOURSELF MAKE ANY INDEPENDENT JUDGMENT ABOUT WHETHER THE NOTICE TO WITHHOLD IS VALID?

A VERY DEFINITELY, YES.

Q AND IN ORDER FOR IT TO BE VALID, DOES THERE HAVE TO BE SOME VIOLATION OF STATE LAW?

A YES.

Q SO DO YOU HAVE TO CONCLUDE BEFORE YOU APPROVE A NOTICE TO WITHHOLD THAT THERE'S BEEN SOME VIOLATION OF STATE LAW?

A THAT'S CORRECT.

Q IS IT YOUR NORMAL PROCEDURE TO MAKE THAT CONCLUSION BASED ON INFORMATION THAT'S BEEN BROUGHT FORWARD BY SOMEONE?

A NO. IT'S BASED UPON THE INVESTIGATION THE DEPUTY CONDUCTED.

Q YOU ONLY LOOK TO WHAT THE DEPUTY SAYS?

A CORRECT.

Q SO IF SOME THIRD PARTY OTHER THAN THE DEPUTY HAD SAID I SAW THIS OR I SAW THAT, YOU DON'T TAKE THAT INTO ACCOUNT AT ALL IN ISSUING A NOTICE TO WITHHOLD?

A THAT'S NOT TRUE. IT'S BASED ON THE

* * *

———

EXHIBIT 5

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

G & G FIRE SPRINKLERS, INC., PLAINTIFF, VS. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, A CORPORATION, DEFENDANT.	CASE NO. BC104623 VOLUME II

DEPOSITION OF ROGER D. MILLER

LOS ANGELES, CALIFORNIA

JANUARY 19, 1995

* * *

[233] NOT RECALL RECEIVING THE LETTER. IT'S VERY POSSIBLE I RECEIVED IT, BUT I DON'T RECALL.

Q SO YOU'RE SAYING YOU DON'T KNOW WHETHER IT'S ACCURATE BECAUSE IT MAY BE THAT YOU RECEIVED IT AND YOU DON'T RECALL RECEIVING IT?

A THAT IS CORRECT.

Q AND IF YOU HAD RECEIVED IT, WHAT WOULD YOU HAVE DONE WITH IT IN TERMS OF FILING IT SOMEWHERE?

A I WOULD NOT HAVE FILED IT. IF IT PERTAINS TO THE CASE, IT WOULD HAVE GONE BACK TO HIM BECAUSE IT WOULD HAVE BEEN KEPT ON THAT CASE. I DO NOT KEEP A SEPARATE FILE.

Q IF YOU SENT THAT LETTER OR ANY SUCH LETTER THAT YOU RECEIVED FROM JUAN GARZA BACK TO THE FILE, WOULD YOU HAVE MADE ANY NOTATION THAT YOU HAD REVIEWED IT OR SOMETHING OF THAT SORT THAT ONE COULD LOOK AT THE FILE AND SEE WHETHER THAT DOCUMENT WAS EVER RECEIVED OR REVIEWED BY YOU?

A NO.

Q WHEN YOU RECEIVE DOCUMENTS IN ORDER TO APPROVE A NOTICE TO WITHHOLD, IN OTHER WORDS, WHEN A DEPUTY LABOR COMMISSIONER GIVES YOU DOCUMENTS WITH REGARD TO A NOTICE TO WITHHOLD THAT'S PROPOSED AND IS ASKING FOR YOU TO APPROVE IT, WHAT DO YOU DO WITH THOSE DOCUMENTS AFTER YOU REVIEW THEM?

[234] A SEND THEM BACK.

Q SEND THEM BACK TO THE DEPUTY?

A CORRECT.

Q AND HOW DO YOU DO THAT? IS IT BY MAIL, BY FAX, WHAT METHOD?

A COULD BE ANY METHOD. GENERALLY, IT'S A PHYSICAL THING THAT I LOOK AT IT AND HAND IT BACK TO THEM. THAT'S GENERALLY HOW THEY'RE APPROVED.

Q YOU'RE SAYING THAT THIS WOULD BE A SITUATION WHERE YOU HAD AN IN-PERSON MEETING WITH THE DEPUTY TO DISCUSS THE NOTICE TO WITHHOLD?

A THAT IS THE GENERAL PROCEDURE, YES.

Q WHAT ABOUT THOSE SITUATIONS WHERE YOU APPROVE THE NOTICE TO WITHHOLD OVER THE TELEPHONE?

A THEN I INSTRUCT THEM TO NOTE THAT IN THE FILE AND NOTE THAT ON THE NOTICE TO WITHHOLD THAT IT HAS BEEN APPROVED.

Q HOW IS THAT SUPPOSED TO BE NOTED ON THE NOTICE TO WITHHOLD?

A THERE IS NO PROCEDURE SET UP FOR THEM TO DO THAT.

Q YOU JUST SAY, "NOTE IT SOMEHOW"?

A THAT'S CORRECT.

Q DO YOU EVER CHECK TO SEE IF THEY'VE DONE THAT?

* * *

[238] THE FILES HAVE TO BE KEPT UP TO DATE, THAT INFORMATION THAT IS RECEIVED, DISCUSSIONS THAT ARE MADE, ARE SUPPOSED TO BE NOTED IN THE FILES.

Q WHAT DID JUAN GARZA SAY TO YOU ABOUT THAT SUBJECT?

A I'M SURE THAT HE WOULD HAVE SAID THAT HE WILL TRY TO DO IT.

Q SO YOU DON'T ACTUALLY REMEMBER HIM SAYING THAT; IS THAT RIGHT?

A THAT'S CORRECT.

Q DO YOU ACTUALLY REMEMBER ANYTHING HE SAID ON THAT SUBJECT?

A NO, I DO NOT.

Q IS IT THE POLICY THAT WHEN ISSUING A NOTICE TO WITHHOLD, THE MAXIMUM AMOUNT OF PENALTY WILL BE ASSESSED?

A THAT WAS THE POLICY, YES.

Q ARE YOU SAYING THAT'S NO LONGER THE POLICY?

A YES.

Q WHEN DID THE POLICY CHANGE?

A I CAN'T GIVE YOU A DATE. I DON'T RECALL.

Q CAN YOU GIVE AN APPROXIMATE DATE?

A APPROXIMATELY FOUR OR FIVE MONTHS AGO.

Q AND WHO CHANGED THAT POLICY?

[239] A I RECEIVED INSTRUCTIONS FROM SIMON REYES.

Q WERE THE INSTRUCTIONS IN WRITING OR ORAL?

A THEY WERE ORAL.

Q THEY WERE ORAL INSTRUCTIONS?

A YES.

Q AND WHAT WERE THE INSTRUCTIONS THAT SIMON REYES GAVE YOU WITH REGARD TO ASSESSMENT OF PENALTIES?

A TO REVIEW THE ASSESSMENTS PRIOR TO THEM BEING ASSESSED.

Q WERE THERE ANY OTHER INSTRUCTIONS THAT SIMON REYES GAVE YOU FOUR OR FIVE MONTHS AGO IN CONNECTION WITH CHANGING THE POLICY WITH REGARD TO ASSESSING PENALTIES?

A NOT THAT I RECALL, NO.

Q SO ALL SIMON REYES SAID TO YOU WAS, "REVIEW THE ASSESSMENTS BEFORE THEY'RE ASSESSED"?

A I DID NOT SAY THAT.

Q WHAT WAS IT THAT SIMON REYES TOLD YOU FOUR OR FIVE MONTHS AGO ABOUT THE POLICY REGARDING PENALTY ASSESSMENTS?

A I THINK I MENTIONED THAT WHEN YOU ASKED THE QUESTION. I TOLD YOU I DON'T RECALL WHAT THE OTHER DISCUSSION WAS. HE WOULD HAVE DISCUSSED THAT WITH I AND THE OTHER SUPERVISOR UP NORTH AS TO WHAT WE NEED TO BE [240] DOING.

Q WHAT WAS YOUR UNDERSTANDING OF HOW THE POLICY WAS BEING CHANGED?

A THAT THE DEPUTY WOULD GET APPROVAL FROM THE SUPERVISOR PRIOR TO ASSESSING THE PENALTIES.

Q PRIOR TO THIS DISCUSSION WITH SIMON REYES FOUR OR FIVE MONTHS AGO, COULD A DEPUTY ASSESS PENALTIES WITHOUT GETTING APPROVAL OF A SUPERVISOR?

A THE DEPUTY WAS INSTRUCTED TO ASSESS THE FULL PENALTIES, YES.

Q AND SO THAT THE NEW PROCEDURE THAT WAS GIVEN TO YOU FROM SIMON REYES FOUR OR FIVE MONTHS AGO WAS THAT THE DEPUTY WAS TO GET APPROVAL FOR THE PENALTIES FROM THE SUPERVISOR; IS THAT RIGHT?

A THAT'S CORRECT.

Q WAS THERE ANY INSTRUCTION GIVEN ABOUT HOW TO GO ABOUT DETERMINING WHAT THOSE PENALTIES SHOULD BE?

A YES.

Q AND WAS THAT INSTRUCTION GIVEN TO YOU BY SIMON REYES?

A YES.

Q AND WAS THIS ORAL OR IN WRITING?

A AS FAR AS I REMEMBER, IT WAS ORAL.

Q WHAT WERE THE INSTRUCTIONS THAT YOU GOT FOUR OR FIVE MONTHS AGO FROM SIMON REYES ABOUT HOW TO

* * *

[266] A THAT'S THE FORM THAT WE WERE TOLD TO USE, SO WE WERE USING IT.

Q WELL, IS ONE OF THE REASONS THAT THAT LANGUAGE IS PUT IN THERE IS THAT ONE WAY TO GET – TO TRY TO GET INFORMATION TO SUPPORT A NOTICE TO WITHHOLD IS TO TELL EMPLOYEES THAT IF THEY SUPPORT YOUR POSITION, THEY'LL GET THE MONEY?

A NO, IT'S NOT.

Q HAVE YOU HAD THAT SITUATION ARISE, CASES WHERE EMPLOYEES WERE MAKING FALSE CLAIMS TO TRY TO GET MONEY?

A I'M SURE WE HAVE, YES.

I NEED MY COPIES BACK, THAT'S ALL. I DON'T WANT YOU TO BURY THEM UNDER THERE. IT WASN'T INTENDED TO INTRODUCE THAT SO THAT –

Q DO YOU HAVE ANY PROCEDURES IN EFFECT TO TRY TO ASSURE THAT THE DEPUTIES DON'T ATTEMPT TO MAKE A CASE BY ACCUMULATING EVIDENCE THAT PEOPLE PROVIDE IN ORDER TO TRY TO IMPROPERLY GET SOME MONEY OR OTHER FINANCIAL BENEFIT?

A WELL, ONE OF THE PROCEDURES IS THAT THE NOTICE TO WITHHOLD IS REVIEWED PRIOR TO IT BEING ISSUED.

Q IT'S REVIEWED BY YOU?

A THAT'S CORRECT.

Q IT'S NOT REVIEWED BY ANYBODY ELSE?

[267] A NO, IT IS NOT.

Q I'M GOING TO SHOW YOU SOME DOCUMENTS. THESE WERE MARKED AS PART OF AN EXHIBIT TO THE DEPOSITION OF JUAN GARZA, AND THESE PARTICULAR DOCUMENTS WERE IN EXHIBIT 2 OF THAT DEPOSITION THAT HAD PAGE NUMBERS 253 THROUGH 260, AND THEY ARE SOME KIND OF COMPUTER PRINTOUTS. THE FIRST PAGE SAYS "EMPLOYER INQUIRY" AT THE TOP. LET ME SHOW THESE TO YOU, AND WHAT I'D LIKE TO KNOW IS HAVE YOU EVER SEEN THIS TYPE OF DOCUMENT BEFORE?

A YES.

Q DO YOU KNOW WHERE THESE DOCUMENTS COME FROM?

A I BELIEVE THEY COME FROM THE EMPLOYMENT DEVELOPMENT DEPARTMENT.

Q HAVE YOU EVER SEEN THESE SPECIFIC DOCUMENTS BEFORE?

A I DO NOT RECALL THESE, NO.

Q ARE DOCUMENTS OF THIS TYPE, THAT IS, THESE PAGES 253, ET CETERA, TO EXHIBIT 2 OF THE JUAN GARZA DEPOSITION, ARE THESE DOCUMENTS THAT WOULD TYPICALLY BE OBTAINED BY DLSE IN CONNECTION WITH INVESTIGATION OF A PREVAILING WAGE MATTER?

A I DON'T KNOW WHAT YOU MEAN "TYPICALLY." IF WE THINK THAT THERE IS A PROBLEM, YES, WE WOULD OBTAIN THE INFORMATION.

* * *

[301] HAVE NOT.

Q THE LETTER STATES THAT THE UNIVERSITY IS GOING TO WITHHOLD $65,875.38 BECAUSE IT RECEIVED A STOP NOTICE FROM THE LABOR COMMISSIONER. LET ME JUST ASK YOU, LOOKING AT THE LETTER, DOES THIS REFRESH YOUR RECOLLECTION TO ANYTHING RELATING TO THE MOORE HALL PROJECT OR G & G?

A NO, IT DOES NOT.

Q IS IT CORRECT THAT WHEN A NOTICE TO WITHHOLD IS ISSUED TO AN AWARDING BODY, THAT THE AWARDING BODY IS REQUIRED TO WITHHOLD THE MONEY AS STATED IN THE NOTICE TO WITHHOLD?

A THAT'S CORRECT.

Q LET ME SHOW YOU PAGES 1503 TO 1534 OF EXHIBIT 25, AND TO TRY TO ASSIST, LET ME EXPLAIN. WHAT THESE APPEAR TO BE IS DOCUMENTS FORWARDED BY ACCI WITH SOME KIND OF ANALYSIS OF HOURS OF SOME KIND AND VARIOUS BACKUP DOCUMENTS, INCLUDING THE CHANGE ORDER TYPE DOCUMENTS AND THINGS. NOW, HAVE YOU EVER SEEN THESE DOCUMENTS BEFORE?

A I DON'T RECALL SEEING THESE DOCUMENTS, NO.

Q SO IS IT YOUR BELIEF YOU HAVE NOT SEEN THEM BEFORE?

A IT'S MY BELIEF I HAVEN'T SEEN THEM. I DON'T RECALL SEEING THEM.

Q WHAT I'D LIKE YOU TO DO IS LOOK AT THE

* * *

EXHIBIT 6

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

G & G FIRE SPRINKLERS, INC., PLAINTIFF, VS. ANAHEIM REDEVELOPMENT AGENCY, ET AL., DEFENDANTS.	)	NO. 71 62 15

VOLUME I

DEPOSITION OF JUAN GARZA

LOS ANGELES, CALIFORNIA

JUNE 7, 1994

* * *

[63] TALKING ABOUT DISCUSSIONS THAT WOULD TAKE PLACE ON A PARTICULAR CASE; IS THAT RIGHT?

A UH-HUH.

Q IS THAT YES?

A YES.

Q YOU HAVE TO SAY "YES."

A I UNDERSTAND. I KNOW THAT. I REALIZE THAT.

Q WAS THERE EVER ANY TIME THAT YOU WERE GIVEN ANY SORT OF GENERIC INSTRUCTION LIKE "HERE IS HOW YOU GO ABOUT DOING AN INVESTIGATION"?

A GENERALLY SPEAKING, YES. IN A GENERAL SENSE, YES. BUT THE DEPUTY HAS ALWAYS BEEN RESPONSIBLE FOR DETERMINING WHAT IS NEEDED IN A CASE TO ESTABLISH THE BASIS FOR ANY ACTION. AND THEN HE WOULD – IN THE CASE OF PUBLIC WORKS, I WOULD GO TO ROGER FOR EACH NOTICE TO WITHHOLD THAT I WOULD ISSUE, THEN TELL HIM, "THIS IS THE BASIS, THIS IS WHAT I HAVE DONE, THIS IS THE EVIDENCE IN THE FILE."

Q BEFORE YOU WOULD UNDERTAKE ONE OF THESE SO-CALLED SELECTIVE INVESTIGATIONS, WOULD YOU GO TO ROGER MILLER AND SAY, "THIS IS WHAT I THINK I OUGHT TO DO" AND GET HIS APPROVAL?

A I THINK I WOULD PROBABLY – THE ANSWER TO THAT WOULD BE YES, BUT IT WOULD BE COUPLED

* * *

EXHIBIT 7

[Names Omitted In Printing]

LEVIN, STEIN, CHYTEN & SCHNEIDER

ATTORNEYS AT LAW
SUIT 1450
12424 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90025
TELEPHONE (310) 207-4663
FAX (310) 207-2803

August 24, 1995

VIA FACSIMILE & FIRST CLASS MAIL

Michael S. Villeneuve, Esq.
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
245 West Broadway, Suite 450
Long Beach, CA 90802-4445

Re: *G & G Fire Sprinklers, Inc./CAL-PAC Construction, Inc./California State University, San Bernardino*

Dear Mr. Villeneuve:

I am writing with regard to a notice of penalty assessment which was issued with regard to the project known as Health, P. E. Classroom, Office Facilities, SB-264 R, California State University, San Bernardino. I have enclosed herewith a copy of the notice of penalty assessment.

I have been informed that the Deputy Labor Commissioner, Rosa Frazier, has stated that the notice of penalty assessment was issued because of non-response to a letter mailed to G & G Fire Sprinklers, Inc. ("G&G"), requesting

copies of certified payroll records. The letter was never received by G&G. According to Ms. Frazier, the letter was sent to a previous address of G&G, where G&G no longer resides.

The prime contractor, CAL-PAC Construction, Inc. ("CAL-PAC") has stated that they never received any request for certified payrolls from Ms. Frazier. According to CAL-PAC, Ms. Frazier stated that she sent the letter to CAL-PAC at an incorrect address, and the letter was returned to Ms. Frazier undelivered.

The penalty assessment is vague as to the amount which shall be withheld thereunder. The penalty assessment states that "The amount due as of 7-11-95, is $8,250.00. The withholding shall continue until you are notified to the contrary by this office." I am informed that the University interprets the notice of penalty assessment to be indefinite in amount, with penalties continuing to accrue on a daily basis. As a result, G&G's final payment for work at the project was not made. Additionally, CAL-PAC has stated that the University is withholding a large amount of its money.

Upon receipt of the notice of penalty assessment, G&G promptly provided copies of certified payrolls to Ms. Frazier. However, Ms. Frazier has been unwilling to rescind the notice of penalty assessment, and unwilling to specify the specific amount to be withheld under the penalty assessment. As a result, it is my understanding that the University is withholding all payment on the project.

I request that the notice of penalty assessment be rescinded immediately. In the event that DLSE is unwilling to rescind the notice of penalty assessment, I request that a specific amount thereof be specified. I also request that you provide me with the following documents and information:

1. A copy of the letter requesting copies of payrolls from G&G.

2. A copy of all documents indicating the addresses to which the aforesaid letter was mailed (whether to G&G or to CAL-PAC).

3. A copy of all documents indicating whether or not the aforesaid letter was received by either CAL-PAC or G&G.

4. An explanation of how the penalty amount of $750.00 per day was determined.

5. A description of all efforts which were made to obtain the payroll records prior to the issuance of the notice of penalty assessment.

The aforesaid information and documents regarding the notice of penalty assessment are needed to determine, among other things, whether the penalty assessment resulted from alleged acts or omissions of CAL-PAC, or of G&G; and thus, whether CAL-PAC is entitled to withhold money from G&G.

Your prompt attention to this matter will be appreciated.

Very truly yours,

LEVIN, STEIN, CHYTEN
& SCHNEIDER

/s/ Stephen A. Seideman
Stephen A. Seideman

SAS/jvs
encl.

LABOR COMMISSIONER, STATE OF CALIFORNIA
Department of Industrial Relations
DIVISION OF LABOR STANDARDS ENFORCEMENT
Bureau of Field Enforcement
145 W. Broadway, Room 450
Long Beach, CA 90802 (310) 499-5303

[SEAL]

CAL. STATE UNIVERSITY, San Bernardino
5500 University Pkwy., #127
San Bernardino, CA 92407

July 11, 1995 In reply, Refer to Claim No: 40-PW-00363/593

NOTICE OF PENALTY ASSESSMENT

[Illegible] Contract No.	Contract No. 1264/Health, P.E., Classroom, Office Facilities SB-264R, California State University, San Bernardino
[Illegible] Contractor	CAL-PAC CONSTRUCTION, INC.
Contractor	G & G FIRE SPRINKLERS, INC.

We have been unable to obtain certified copies of payroll records concerning the above-named project.

Pursuant to Section 1778(f) of the Labor Code, you are hereby directed to withhold $750.00, per calendar day, commencing July 1, 1995, from any and all progress payments which are now or hereafter may become due to the contractor(s) hereinafter named. The amount due as of 7-11-95, is $8,250.00.

The withholding shall continue until you are notified to the contrary by this office.

You are hereby required, pursuant to said section to withhold any and all payments which are now or hereafter may become due to the contractor herein above named to the extent of the claim as herein above shown.

I declare under perjury as follows: I am an authorized representative acting for the State Labor Commissioner. I declare that I have read the foregoing Notice of Penalty Assessment and I have made an Investigation of the facts relating thereto, and based on all the facts known to me at this time and based on all of the statements and information given to me at this time. I am informed and believe that the foregoing Notice of Penalty Assessment is true and correct and that the facts have been found to support this Notice.

Executed on July 11, 1995, at Long Beach, California.

STATE LABOR COMMISSIONER

By /s/ Rosa Frazier
Rosa Frazier, Deputy Labor Commissioner

cc: Bonding Company
✓ Prime Contractor
Subcontractor

Transmission-Report

Time: Aug 24 '95 16:22

Tel Number: 3102072803

Name: L S C & S Attorneys

NBR:	926
Date:	August 24
Time:	16:19
Duration:	03/11
PGS:	04
To:	(310) 499-6367
Dept. Code	
Mode:	G3
Status:	OK

EXHIBIT 8

ARTER & HADDEN

ATTORNEYS AT LAW

founded 1843

Jamboree Center
Two Park Plaza/Suite 700
Irvine, California 92714
714/252-7500 *phone*
714/833-9604 *facsimile*

[Other Offices Omitted In Printing]

August 28, 1995

VIA FACSIMILE

Michael S. Villeneuve
Division of Labor Standards Enforcement
Department of Industrial Relations
State of California
245 W. Broadway, Suite 450
Long Beach, California 90802-4445

Re: *Notice of Withhold; G&G FireSprinklers, Inc.*

Dear Michael:

Enclosed please find a letter from the California State University to Cal-Pac Construction, Inc. dated August 22, 1995. As this letter indicates, the University is refusing to honor Cal-Pac's payment application because of an open ended order to withhold funds issued by the Labor Commissioner. This Notice of Withhold was issued by your office on July 12, 1994 and instructed the University to withhold the sum of $750.00 per day until further notice. As you know, this Notice of Withhold relates to a request made by the Labor Commissioner for the certified payroll

records of G&G FireSprinklers, Inc. It is our understanding that this request was sent to the wrong address, and that after the proper notice was given, all appropriate documents have been provided.

As this letter indicates, the University is not prepared to release any portion of the $501,000 in Cal-Pac's funds it is holding until the University receives notification from your office of the resolution of this Notice of Withhold. If this situation continues to persist, we can expect that many of Cal-Pac's subcontractors, who will not be paid, will serve stop notices or commence litigation. As a result, the damages which Cal-Pac may incur will be substantial. Accordingly, I request that you contact me immediately to discuss how this issue can be promptly resolved.

Thank you for your attention to the above, and I look forward to hearing from you soon.

Very truly yours,

ARTER & HADDEN

/s/ Jack W. Fleming
Jack W. Fleming

JWF:sm
Encl.

cc: Cal-Pac Construction, Inc. (w/encl.)
Richard Ceccia, Esq. (w/encl.)

THE CALIFORNIA STATE UNIVERSITY

(Cities Omitted In Printing)

THE CHANCELLOR – SWRL LOCATION
(310)[illegible] TELEFAX: (310)[illegible]

August 22, 1995

[Illegible] Joe Wyhowanec
Cal-Apc Construction, Inc.
[illegible] Bristol Parkway, Suite 106
Culver City, CA 90230

Dear Mr. Wyhowanec:

Stop Notice – Steelform Contracting Company
Stop Notice Summary
SB-264(R), Health/P.E. Building
California State University, San Bernardino

[Illegible] are in receipt of your Payment Request No. 31 (which should be No. 30) signed by [Illegible] Heller. This request cannot be honored because of the open-ended Labor Commissioner order to withhold $750.00 per day until their complaint has been satisfied. This withhold now is about $40,000.00 and increasing daily.

[Illegible], the next payment request must accurately account for the stop notices that still [illegible]. Our records show this to be about $397,000.00 as of today. however, this [illegible] may have to be increased due to recent correspondence from Attorney Laurel S. [Illegible], representing Steel Form, claiming a stop notice in the amount of $83,191.98 (out [illegible] must be $103,989.98). This stop notice, addressed to Michael Clevenger, apparently got lost in our office, as it was signed for on August

1, 1994 by our receptionist. Therefore, the amount currently held should be about $501,000.00, unless [illegible] have a satisfactory resolution of any of the remaining items.

Enclosed is a copy of a stop notice dated July 27, 1994 from Steelform Contracting company in the amount of $83,191.98 filed against the subject project.

[Illegible] with Section 3186 of the California Civil Code, we will honor the stop [illegible] insofar as monies exist which are otherwise due and payable to your firm. [Illegible] to the availability of these funds, we will hold in retention 125% of the amount [illegible] stop notice ($103,989.98). Please review these matters, as well as outstanding [illegible] in my letter dated August 9, 1995, with Tony Espinosa.

[Illegible] you know, G. E. Supply is subpoenaing all records relating to this project and [illegible] mencing suit against the bond. Your assistance toward early resolution of [illegible] standing matters will be appreciated.

Sincerely,

[Illegible] E. Ownen, P.E.
[Illegible] Engineer
[Illegible] Planning and Development

[Illegible]

Enclosures: Copy of Attorney Laurel S. Stanley's letter of 8-15-95
Copy of Stop Notice
Copy of Stop Notice Receipt

Mr. David DeMauro
Mr. Bill Shum
Mr. Tony Simpson
Mr. Clifford Hahn
Ms. Stephanie Giordano
Mr. Herbert Zuidema

EXHIBIT 9

LABOR CODE

EXCERPTS FROM THE CALIFORNIA LABOR CODE, DIVISION 2

PART 7. PUBLIC WORKS AND PUBLIC AGENCIES

CHAPTER 1. Public Works

Article 1. Scope and Operation

1720. As used in this chapter, "public works" means:

(a) Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority.

(b) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(c) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(f) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

(Amended by Stats. 1989, Ch. 278. Effective August 7, 1989.)

1720.2. For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, "public works" also means any construction work done under private contract when all of the following conditions exist:

(a) The construction contract is between private persons.

(b) The property subject to the construction contract is privately owned, but upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use.

(c) Either of the following conditions exists:

(1) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract.

(2) The construction work is performed according to plans, specifications, or criteria furnished by the state or political subdivision, and the lease agreement between

the lessor and the state or political subdivision, as lessee, is entered into during, or upon completion of, the construction work.

(Amended by Stats. 1980, Ch. 962.)

1720.3. For the limited purposes of Article 2 (commencing with Section 1770), "public works" also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including the California State University and the University of California.

(Amended by Stats. 1983, Chs. 142, 143.)

1720.4. For the limited purposes of this chapter, "public works" shall not include any otherwise covered work which meets all the following conditions:

(a) The work is performed entirely by volunteer labor.

(b) The work involves facilities or structures which are, or will be, used exclusively by, or primarily for or on behalf of, private nonprofit community organizations including, but not limited to, charitable, youth, service, veterans, and sports groups or associations.

(c) The work will not have an adverse impact on employment.

(d) The work is approved by the Director of Industrial Relations as meeting the requirements of this section.

For purposes of subdivision (c), the director shall request information on whether or not the work will have an adverse impact on employment from the appropriate

local or state organization of duly authorized employee representatives of workers employed on public works.

(Added by Stats. 1989, Ch. 1224.)

1721. "Political subdivision" includes any county, city, district, public housing authority, or public agency of the State, and assessment or improvement districts.

(Amended by Stats. 1985, Ch. 239.)

1722. "Awarding body" or "body awarding the contract" means department, board, authority, officer or agent awarding a contract for public work.

(Added by Stats. 1937, Ch. 90)

1722.1. For the purposes of this chapter, "contractor" and "subcontractor" include a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in that capacity, when working on public works pursuant to this article and Article 2 (commencing with Section 1770).

(Amended by Stats. 1982, Ch. 454.)

1723. "Workman" includes laborer, workman, or mechanic.

1724. "Locality in which public work is performed" means the county in which the public work is done in cases in which the contract is awarded by the State, and means the limits of the political subdivision on whose behalf the contract is awarded in other cases.

1725. "Alien" means any person who is not a born or fully naturalized citizen of the United States.

1726. The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of the execution of the contract.

(Added by Stats. 1937, Ch. 90)

1727. Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all wages and penalties which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Standards Enforcement or by the awarding body.

(Amended by Stats. 1992, Ch. 1342.)

1728. In cases of contracts with assessment or improvement districts where full payment is made in the form of a single warrant, or other evidence of full payment, after completion and acceptance of the work, the awarding body shall accept from the contractor in cash a sum equal to, and in lieu of, any amount required to be withheld, retained, or forfeited under the provisions of this section, and said awarding body shall then release the final warrant or payment in full.

1729. It shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the subcontractor's failure to comply with the terms of this chapter, and if payment has already been made to the subcontractor the contractor may

recover from him the amount of the penalty or forfeiture in a suit at law.

(Added by Stats. 1937, Ch. 90)

1730. Every awarding body shall transfer all wages and penalties that have been withheld pursuant to Section 1727 to the Labor Commissioner, for disbursement pursuant to Section 1775, whenever a contractor fails to bring a suit against the awarding body for recovery of wages and penalties that are withheld pursuant to Section 1727 within 90 days after the completion of the contract and formal acceptance of the job.

(Repealed and added by Stats. 1992, Ch. 1342.)

1731. If suit is brought against the awarding body within the 90-day period and formal notice thereof is given to the awarding body within the 90-day period either by service of summons or by registered mail which is received within the 90-day period, the wages and penalties shall be retained by the awarding body pending the outcome of the suit, and be forwarded to the Labor Commissioner for disbursement pursuant to Section 1775 if the contractor does not prevail in the action. Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund.

1732. Notwithstanding any other provision of law, the time for action by the contractor or his or her assignee for the recovery of wages or penalties is limited to the 90-day period and suit on the contract for alleged breach

thereof in not making the payment is the exclusive remedy of the contractor or his or her assignees with reference to those wages or penalties.

1733. Suit may be brought by the contractor or his or her assignee without permission from the state or other authority and is limited to the recovery of the wages and penalties without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract. No other issues shall be presented to the court in the case and the burden shall be on the contractor or his or her assignee to establish his or her right to the wages or penalties withheld. The Division of Labor Standards Enforcement may intervene in any court proceeding brought pursuant to this section. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on motion of the awarding body or the Division of Labor Standards Enforcement.

The Division of Labor Standards Enforcement may, upon written request of any awarding body, assist in the defense of the action.

(Amended by Stats. 1992, Ch. 1342.)

1734. Any court collecting any fines or penalties under the criminal provisions of this chapter or any of the labor laws pertaining to public works shall as soon as practicable after the receipt thereof deposit same with the county treasurer of the county in which such court is situated. Amounts so deposited shall be paid at least once a month by warrant of the county auditor drawn upon

requisition of the judge or clerk of said court, to the State Treasurer for deposit in the General Fund.

(Amended by Stats. 1953, Ch. 523.)

1735. No discrimination shall be made in the employment of persons upon public works because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of such persons, except as provided for in Section 12940 of the Government Code, and every contractor for public works violating this section is subject to all the penalties imposed for a violation of this chapter.

(Amended by Stats. 1980, Ch. 992.)

1740. Notwithstanding any other provision of this chapter or any other law of this State, except limitations imposed by the Constitution, the legislative body of a political subdivision which has received or is to receive a loan or grant of funds from the Federal Government or a federal department or agency for public works of that political subdivision, may provide in its call for bids in connection with such public works that all bid specifications and contracts and other procedures in connection with bids or contracts shall be subject to modification to comply with revisions in federal minimum wage schedules without necessity of republication or duplication of other formal statutory requirements.

(Added by Stats. 1957, Ch. 1992)

Article 1.5. Right of Action

1750. (a)(1) The second lowest bidder, and any person, firm, association, trust, partnership, labor organization, corporation, or other legal entity which has, prior to the letting of the bids on the public works project in question, entered into a contract with the second lowest bidder, that suffers damage as a proximate result of a competitive bid for a public works project, as defined in subdivision (b), not being accepted due to the successful bidder's violation, as evidenced by the conviction of the successful bidder therefor, of any provision of Division 4 (commencing with Section 3200) or of the Unemployment Insurance code, may bring an action for damages in the appropriate state court against the violating person or legal entity.

(2) There shall be a rebuttable presumption that a successful bidder who has been convicted of a violation of any provision of Division 4 (commencing with Section 3200) of this code or of the Unemployment Insurance Code, or of both, was awarded the bid because that successful bidder was able to lower the bid due to this violation or these violations occurring on the contract for public work awarded by the public agency.

(b) For purposes of this article:

(1) "Public works project" means the construction, repair, remodeling, alternation, conversion, modernization, improvement, rehabilitation, replacement, or renovation of a public building or structure.

(2) "Second lowest bidder means the second lowest qualified bidder deemed responsive by the public agency awarding the contract for public work.

(3) The "second lowest bidder" and the "successful bidder" may include any person, firm, association, corporation, or other legal entity.

(c) In an action brought pursuant to this section, the court may award costs and reasonable attorney's fees, in an amount to be determined in the court's discretion, to the prevailing party.

(d) For the purpose of an action brought pursuant to this section, employee status shall be determined pursuant to Division 4 (commencing with Section 3200) with respect to alleged violations of that division, pursuant to the Unemployment Insurance Code with respect to alleged violations of that code, and pursuant to Section 2750.5 with respect to alleged violations of either Division 4 (commencing with Section 3200) or of the Unemployment Insurance Code.

(e) The right of action established pursuant to this article shall not be construed to diminish rights of action established pursuant to Section 19102 of, Article 1.8 (commencing with Section 20104.70) of Chapter 1 of Part 3 of Division 2 of, the Public Contract Code.

(f) A second lowest bidder who has been convicted of a violation of any provision of Division 4 (commencing with Section 3200) of the Labor Code or of the Unemployment Insurance Code, or both, within one year prior to filing the bid for public work, and who has failed to take

affirmative steps to correct that violation or those violations, is prohibited from taking any action authorized by this section.

(Added by Stats. 1991 Ch. 906)

Article 2. Wages

1770. The director of the Department of Industrial Relations shall determine the general prevailing rate of per diem wages in accordance with the standards set forth in Section 1773, and the director's determination in the matter shall be final except as provided in Section 1773.4. Nothing in this article, however, shall prohibit the payment of more than the general prevailing rate of wages to any workman employed on public work. Nothing in this act shall permit any overtime work in violation of Article 3 of this chapter.

(Amended by Stats. 1976, Ch. 281.)

1771. Except for public works projects of one thousand dollars ($1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

(Amended by Stats. 1981, Ch. 449.)

1771.5. (a) Notwithstanding Section 1771, an awarding body shall not require the payment of the general prevailing rate of per diem wages or the general prevailing rate of per diem wages for holiday and overtime work for any public works project of twenty-five thousand dollars ($25,000) or less when the project is for construction work, or for any public works project of fifteen thousand dollars ($15,000) or less when the project is for alteration, demolition, repair, or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program pursuant to subdivision (b) for every public works project under the authority of the awarding body.

(b) For the purposes of this section, a labor compliance program shall include, but not be limited to, the following requirements:

(1) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of this chapter.

(2) A prejob conference shall be conducted with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract.

(3) Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury.

(4) The awarding body shall review, and, if appropriate, audit payroll records to verify compliance with this chapter.

(5) The awarding body shall withhold contract payments when payroll records are delinquent or inadequate.

(6) The awarding body shall withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.

(Added by Stats. 1989, Ch. 1224.)

1771.6. Notwithstanding Sections 1730, 1731, and 1734, any political subdivision which enforces this chapter in accordance with Section 1771.5 shall, at the expiration of 90 days after the completion of the contract and the formal acceptance of the job, deposit all penalties or forfeitures withheld from any contract payment in the general fund of the political subdivision. Any court collecting any fines or penalties under the criminal provisions of this chapter, or any of the labor laws pertaining to public works, when the fines and penalties resulted from enforcement actions by a political subdivision pursuant to Section 1771.5, shall deposit the fines or penalties in the general fund of the political subdivision.

(Added by Stats. 1989, Ch. 1224.)

1771.7. A contractor may appeal an enforcement action by a political subdivision pursuant to Section 1771.5 to the Director of Industrial Relations. Any ruling by the director shall be final and, notwithstanding Section 1732, any appeal shall waive that contractor's right to bring court action on the same issue.

(Added by Stats. 1989, Ch. 1224.)

1772. Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.

(Amended by Stats. 1992, Ch. 1342.)

1773. The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification or type of workman needed to execute the contract from the Director of the Department of Industrial Relations. The holidays upon which such rates shall be paid need not be specified by the awarding body, but shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workman employed on the project.

In determining such rates, the Director of the Department of Industrial Relations shall ascertain and consider the applicable wage rates established by collective bargaining agreements and such rates as may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where such rates do not constitute the rates actually prevailing in the locality, the director shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification or type of work involved. The rate fixed for each craft, classification or type of work

shall be not less than the prevailing rate paid in such craft, classification or type of work.

If the director determines that the rate of prevailing wage for any craft, classification or type of workman is the rate established by a collective bargaining agreement, the director may adopt such rate by reference as provided for in such agreement and such determination shall be effective for the life of such agreement or until the director determines that another rate should be adopted.

(Amended by Stats. 1976, Ch. 281.)

1773.1 Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel time, and subsistence pay as provided for in Section 1773.8, apprenticeship or other training programs authorized by Section 3093, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works.

For the purpose of determining such per diem wages for contracts entered into with the state, the representative of any craft, classification or type of workman needed to execute the contracts entered into with the state shall file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements for the particular craft, classification or type of work involved. Such agreements shall be filed within 10 days after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids.

(Amended by Stats. 1976, Ch. 281.)

1773.2. The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract.

In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may, in the call for bids, bid specifications, and contract, include a statement that copies of the prevailing rate of per diem wages are on file at its principal office, which shall be made available to any interested party on request. The awarding body shall also cause a copy of the determination of the director of the prevailing rate of per diem wages to the posted at each job site.

(Amended by Stats. 1992, Ch. 1342.)

1773.3 An awarding agency whose public works contract fails within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. When specifically requested by a local joint apprenticeship committee, the division shall notify the local joint apprenticeship committee regarding all such awards applicable to the joint apprenticeship committee making the request. Within five days of a finding of any discrepancy regarding the ratio of apprentices to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards.

(Added by renumbering Section 3098 by Stats. 1978, Ch. 1249.)

1773.4. Any prospective bidder or his representative, any representative of any craft, classification or type of workman involved, or the awarding body may, within 20 days after the commencement of advertising of the call for bids by the awarding body, file with the Director of Industrial Relations a verified petition to review the determination of any such rate or rates upon the ground that they have not been determined in accordance with the provision of Section 1773 of this code. Within two days thereafter, a copy of such petition shall be filed with the awarding body. The petition shall set forth the facts upon which it is based. The Director of Industrial Relations or his authorized representative shall, upon notice to the petitioner, the awarding body and such other persons as he deems proper, including the recognized collective bargaining representatives for the particular crafts, classifications, or types of work involved, institute an investigation or hold a hearing. Within 20 days after the filing of such petition, or within such longer period as agreed upon by the director, the awarding body, and all the interested parties, he shall make a determination and transmit the same in writing to the awarding body and to the interested parties.

Such determination shall be final and shall be the determination of the awarding body. Upon receipt by it of the notice of the filing of such petition the body awarding the contract or authorizing the public work shall extend the closing date for the submission of bids or the starting of work until five days after the determination of the

general prevailing rates of per diem wages pursuant to this section.

Upon the filing of any such petition, notice thereof shall be set forth in the next and all subsequent publications by the awarding body of the call for bids. No other notice need be given to bidders by the awarding body by publication or otherwise. The determination of the director shall be included in the contract.

(Amended by Stats. 1969, Ch. 301.)

1773.5. The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out this chapter, including, but not limited to, the responsibilities and duties of awarding bodies under this chapter.

(Amended by Stats. 1989, Ch. 1224.)

1773.6. If during any quarterly period the Director of Industrial Relations shall determine that there has been a change in any prevailing rate of per diem wages in any locality he shall make such change available to the awarding body and his determination shall be final. Such determination by the Director of Industrial Relations shall not be effective as to any contract for which the notice to bidders has been published.

(Amended by Stats. 1976, Ch. 261.)

1773.7. The provisions of Section 11250 of the Government Code shall not be applicable to Section 1773, 1773.4 and 1773.6.

(Repealed and added by Stats. 1976, Ch. 281.)

1773.8. The body awarding any contract for public work shall include in the specifications for the contract a requirement requiring the payment of travel and subsistence payments to each workman needed to execute the work, as such travel and subsistence payments are defined in the applicable collective bargaining agreements filed in accordance with this section.

To establish such travel and subsistence payments for contracts entered into with the state, each city, county and city and county, the representative of any craft, classification or type of workman needed to execute the contracts shall file with the Department of Industrial Relations fully executed copies of collective bargaining agreements for the particular craft, classification or type of work involved. Such agreements shall be filed within 10 days after their execution and thereafter shall establish such travel and subsistence payments whenever filed 30 days prior to the call for bids.

(Added by Stats. 1968, Ch. 880.)

1774. The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.

(Added by Stats. 1937, Ch. 90.)

1775. The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is

employed for any public work done under the contract by him or her or by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all penalties and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided in this section. This action shall be commenced not later

than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after the acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contractor to establish that the penalties and amounts demanded in the action are not due.

Out of any money withheld, recovered, or both there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both to pay each worker in full, the money shall be prorated among all workers.

(Amended by Stats. 1992, Ch. 1342.)

1776. (a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the

employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or copies thereof made; provided, however, that a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated in a manner so as to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or performing the contract shall not be marked or obliterated.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this section. In the event that the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. These stipulations shall fix the responsibility for compliance with this section on the prime contractor.

(i) The director shall adopt rules consistent with the California Public Records Act, (Ch. 3.5 (commencing with Sec. 6250), Div. 7, Title 1, Gov. C.) and the Information Practices Act of 1977, (Title 1.8 (commencing with Sec. 1798) Pt. 4, Div. 3, Civ. C.) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

(Amended by Stats. 1992, Ch. 1342.)

1777. Any officer, agent, or representative of the State or of any political subdivision who willfully violates any provision of this article, and any contractor, or subcontractor, or agent or representative thereof, doing public work who neglects to comply with any provision of Section 1776 is guilty of a misdemeanor.

(Added by Stats. 1937, Ch. 90.)

1777.1 (a) Whenever any contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in violation of this chapter with intent to defraud, except Section 1777.5, the contractor or subcontractor or any firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible to bid on or to receive any public works contract for a period of not less than one year or more than three years. The period of debarment shall run from the date the determination of the violation is made by the Labor Commissioner.

(b) Whenever any contractor or subcontractor performing a public works project pursuant to this chapter is

found by the Labor Commissioner to be in willful violation of this chapter, except Section 1777.5, the contractor or subcontractor or any firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible to bid on or to receive any public works contract for a period up to three years for each second and subsequent violation occurring within three years of a separate and previous willful violation of this chapter. These periods of debarment shall run from the date the determination of the violation is made by the Labor Commissioner.

(c) Any determination by the Labor Commissioner shall be made after a full investigation by the Labor Commissioner and a fair and impartial hearing and reasonable notice.

(d) A willful violation occurs when the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.

(e) The Labor Commissioner shall promulgate rules and regulations for the administration and enforcement of this section, the definition of terms, and appropriate penalties.

(Added by Stats. 1989, Ch. 1224.)

1777.5 Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he or she is employed, and shall be

employed only at the work of the craft or trade to which he or she is registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3, are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the apprenticeship standards and apprentice agreements under which he or she is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him or her, in performing any of the work under the contract or subcontract, employs workers in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, approval as established by the joint apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or committees, subsequent or approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. Every contractor and subcontractor shall submit contract award information to the applicable joint apprenticeship committee which shall include an estimate of journeyman hours to be performed under the contract,

the number of apprentices to be employed, and the approximate dates the apprentices will be employed. There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of work performed by apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentices work for every five hours of labor performed by a journeyman. However, the minimum ratio for the land surveyor classification shall not be less than one apprentice for each five journeymen.

Any ratio shall apply during any day or portion of a day when any journeyman, or the higher standard stipulated by the joint apprenticeship committee, is employed at the job site and shall be computed on the basis of the hours worked during the day by journeymen so employed, except for the land surveyor classification. The contractor shall employ apprentices for the number of hours computed as above before the end of the contact. However, the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or

trade are employed at the job site. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Division of Apprenticeship Standards, upon application of a joint apprenticeship committee, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

The contractor or subcontractor, if he or she is covered by this section, upon issuance of the approval certificate, or if he or she has been previously approved in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he or she employs apprentices in the craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by a journeyman, or in the land surveyor classification, one apprentice for each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 hourly ratio as set forth in this section. This section shall not apply to contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor, when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars ($30,000) or 20 working days. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week, shall not be used to calculate the hourly ratio required by this section.

"Apprenticeable craft or trade," as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations

prescribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) Unemployment for the previous three-month period in the area exceeds an average of 15 percent.

(b) The number of apprentices in training in such area exceeds a ratio of 1 to 5.

(c) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis, or on a local basis.

(d) Assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

When exemptions are granted to an organization which represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him or her, who, in performing any

of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he or she employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept the funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of the contributions in computing his or her bid for the contract. The Division of Labor Standards Enforcement is authorized to enforce the payment of the contributions to the fund or funds as set forth in section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

All decisions of the joint apprenticeship committee under this section are subject to Section 3081.

(Amended by Stats. 1989, Ch. 1224.)

1777.6. It shall be unlawful for an employer or a labor union to refuse to accept otherwise qualified employees as registered apprentices on any public works, on the ground of the race, religious creed, color, national

origin, ancestry, sex, or age, except as provided in Section 3077, of such employee.

(Amended by Stats. 1976, Ch. 1179. Effective September 22, 1976.)

1777.7. (a) In the event a contractor or subcontractor willfully fails to comply with Section 1777.5, the Director of Industrial Relations shall deny to the contractor or subcontractor, both individually and in the name of the business entity under which the contractor or subcontractor is doing business, the right to bid on, or to receive, any public works contract for a period of up to one year for the first violation and for a period of up to three years for the second and subsequent violations. Each period of debarment shall run from the date the determination of noncompliance by the Administrator of Apprenticeship becomes an order of the California Apprenticeship Council.

(b) A contractor or subcontractor who violates Section 1777.5 shall forfeit as a civil penalty the sum of fifty dollars ($50) for each calendar day of noncompliance. Notwithstanding Section 1727, upon receipt of a determination that a civil penalty has been imposed, the awarding body shall withhold the amount of the civil penalty from contract progress payments then due or to become due.

(c) In lieu of the penalty provided for in subdivision (a) or (b), the director may for a first time violation and with the concurrence of the joint apprenticeship committee, order the contractor or subcontractor to provide apprentice employment equivalent to the work hours that

would have been provided for apprentices during the period of noncompliance.

(d) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if the awarding body is an entity other than the state.

(e) The interpretation and enforcement of Section 1777.5 and this section shall be in accordance with the rules and procedures of the California Apprenticeship Council.

(Repealed and added by Stats. 1989, Ch. 1224.)

1778. Every person, who individually or as a representative of an awarding body or public body or officer, or as a contractor or subcontractor doing public work, or agent or officer thereof, who takes, receives, or conspires with another to take or receive, for his own use or the use of any other person any portion of the wages of any workman or working subcontractor, in connection with services rendered upon any public work is guilty of a felony.

(Added by Stats. 1937, Ch. 90.)

1779. Any person or agent or officer thereof who charges, collects, or attempts to charge or collect, directly or indirectly, a fee or valuable consideration for registering any person for public work, or for giving information as to where such employment may be procured, or for placing, assisting in placing, or attempting to place, any person in public work, whether the person is to work directly for the State, or any political subdivision or for a

contractor or subcontractor doing public work is guilty of a misdemeanor.

(Added by Stats. 1937, Ch. 90.)

1780. Any person acting on behalf of the State or any political subdivision, or any contractor or subcontractor or agent or representative thereof, doing any public work who places any order for the employment of a workman on public work where the filling of the order for employment involves the charging of a fee, or the receiving of a valuable consideration from any applicant for employment is guilty of a misdemeanor.

(Added by Stats. 1937, Ch. 90.)

Article 3. Working Hours.

1810. Eight hours labor constitutes a legal day's work in all cases where the same is performed under the authority of any law of this State, or under the direction, or control, or by the authority of any officer of this State acting in his official capacity, or under the direction, or control by the authority of any municipal corporation, or of any officer thereof. A stipulation to that effect shall be made a part of all contracts to which the State or any municipal corporation therein is a party.

(Added by Stats. 1937, Ch. 90.)

1811. The time of service of any workman employed upon public work is limited and restricted to 8 hours during any one calendar day, and 40 hours during any

one calendar week, except as hereinafter provided for under Section 1815.

(Amended by Stats. 1963, Ch. 964.)

1812. Every Contractor and subcontractor shall keep an accurate record showing the name of and actual hours worked each calendar day and each calendar week by each worker employed by him or her in connection with the public work. The record shall be kept open at all reasonable hours to the inspection of the awarding body and to the Division of Labor Standards Enforcement.

(Amended by Stats. 1988, Ch. 160.)

1813. The contractor shall, as a penalty to the State or political subdivision on whose behalf the contact is made or awarded, forfeit twenty-five dollars ($25) for each workman employed in the execution of the contract by the contractor or by any subcontractor for each calendar day during which such workman is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted therein a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the officer of the State or political subdivision who is authorized to pay the contractor money due him under the contract.

(Amended by Stats. 1963, Ch. 964.)

1814. Any office, agent or representative of the State or any political subdivision who violates any provision of

this article and any contractor or subcontractor or agent or representative thereof doing public work who neglects to comply with any provision of Section 1812 is guilty of a misdemeanor.

(Added by renumbering Section 1816 by Stats. 1961, Ch. 238.)

1815. Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day at not less than 1½ times the basic rate of pay.

(Amended by Stats. 1963, Ch. 964.)

Article 5. Securing Workers' Compensation
(Article 5 added by Stats. 1965, Ch. 1000)

1860. The awarding body shall cause to be inserted in every public works contract a clause providing that, in accordance with the provisions of Section 3700 of the Labor Code, every contractor will be required to secure the payment of compensation to his employees.

(Added by Stats. 1965, Ch. 1000.)

1861. Each contractor to whom a public works contract is awarded shall sign and file with the awarding body the following certification prior to performing the work of the contract: "I am aware of the provisions of Section 3700 of the Labor Code which require every

employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this contract."

(Amended by Stats. 1979, Ch. 373.)

(Certificate Of Service Omitted In Printing)

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	CASE NO. 95-4839 R (BQRx) MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT Date: November 6, 1995 Time: 10 a.m. Courtroom: No. 8 (Filed Oct. 23, 1995)

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

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I. INTRODUCTION

Plaintiff filed this action on July 21, 1995. After service of the Summons and Complaint on July 27, the Defendants named in the Complaint filed a timely Motion to Dismiss under Rule 12 (b) of the Federal Rules of Civil Procedure on August 16. Thereafter, on September 7, Plaintiff filed a First Amended Complaint, naming additional parties in a patent attempt to cure defects in the original Complaint. Defendants filed a second Motion to Dismiss on September 19. That motion is to be heard on November 6.

There has been no discovery in this case nor even an Early Meeting of Counsel pursuant to Rule 6 of the Local Rules. Plaintiff filed the present motion, making personal service on counsel for Defendants an October 16, thereby providing the minimum 21 day notice under Rule 7.4. This motion is also to be heard on November 6.

This action raises a complicated due process challenge to an entire statutory scheme designed to ensure the payment of prevailing wages by contractors involved in public work projects. This premature and seemingly hastily assembled motion is based on unfounded and speculative allegations by the President of Plaintiff concerning the application and administration of the law, and by the unsupported opinions of his attorney, an associate in a law firm with a mere ten years of experience and an unspecified number of trials, concerning the operation of the court system in California.

II. ARGUMENT

A. The Motion Should Be Denied On The Ground That It Is Premature.

It is well settled under the cases that have interpreted Rule 56 of the Federal Rules of Civil Procedure that an application for summary judgment should be denied where the opposing party has had insufficient time to engage in discovery necessary to justify its opposition to the motion. *Grove v. Mead School District*, 753 F. 2d 1528 (9th Cir. 1985) certiorari denied 473 U.S. 826.

Summary judgment "should be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5, 106 S. Ct. 2505, 2511 n. 5 (1986).

Here there has been no discovery by either party. Counsel have not even had an opportunity to have an Early Meeting of Counsel, largely due to the fact that Plaintiff has amended its Complaint to forestall Defendants' motion to dismiss. What plaintiff is obviously doing is trying to prevent the Court from ruling rule based on a full evidentiary record.

"A summary judgment is neither a method for avoiding the necessity for proving one's case nor a clever procedural gambit whereby a claimant can shift to an adversary the burden of proof of one or more issues." *Watts v. United States*, 703 F. 2d 346, 347.

Plaintiff may not be permitted to "rush to judgment" in a case containing as many serious and complex issues

as this one. The present motion should accordingly be denied on the ground that it is premature.

B. The Motion Should Be Denied On The Ground That The Supporting Declarations Do Not Comply With The Requirements Of Rule 56(e)

Under Rule 56(e), declarations supporting a motion for summary judgment must be evidentiary in nature and must meet the requirements of the Federal Rules of Evidence. Defendants have contemporaneously filed objections to the Declarations of Itai Ben-Artzi and Stephen A. Seideman on the grounds of lack of foundation, lack of personal knowledge, speculation, and hearsay.

Moreover, our Supreme Court long ago issued a warning about granting summary judgment motions based on opinion evidence, pointing out that in most cases such "evidence" is insufficient as a basis for summary judgment. *Sartor v. Arkansas National Gas Corporation*, 321 U.S. 620, 64 S. Ct. 724 (1944)

The courts have accordingly held that opinions of nonexperts are inadmissible for purposes of summary judgment. *De Pinto v. Provident Security Life Insurance Co.*, 374 F. 2d 50, 55 (9th Cir. 1967) certiorari denied 389 U.S. 822.

The Declaration of Stephen A. Seideman, while it attempts to establish its declarant as an expert on the court system in California, falls far short of the mark in laying the groundwork for such a grandiose claim. Mr. Seideman, according to this declaration, is an associate in a law firm with ten years experience. But the nature of his

experience for this modest length of time is never disclosed. In fact, though he claims to have "practiced civil litigation in state courts in California," he never avers that he has tried even one case in the superior or municipal courts. The conclusionary statement that he is "personally familiar with the amount of time it takes to litigate a civil case in said courts, at both the trial and appellate level," is, incredibly enough, never substantiated with any facts. We are never told if this assertion is based on counsel's personal knowledge or is mere scuttlebutt. Likewise, his admitted "speculation" about the effect of the new "three strikes" sentencing law in criminal cases is simply that, speculation.

Can counsel really expect the Court to strike down an entire statutory scheme designed to preserve the wages of working people based solely on this kind of "expert" testimony? The fact that he apparently does is only further indication of lack of expertise.

C. This Case Does Not Lend Itself To Summary Judgment

This case involves complicated issues of constitutional law as well as serious questions concerning the intent of the individual defendants in performing their duties. At stake is the status of an established and long-standing program for the preservation of prevailing wages on public works.

Our Supreme Court has observed that summary judgment may not be an appropriate vehicle for adjudication of constitutional attacks on the operations of state programs. *Askew v. Hargrave*, 401 U.S. 476, 91 S. Ct. 856

(1971) Such important questions need to be resolved on the fuller record provided at trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 68 S. Ct. 1031 (1948).

"Actions alleging violations of the Due Process or Equal Protection Clauses of the Fifth and Fourteenth Amendments also often cannot be resolved on a Rule 56 motion because the court" must determine malice or intent of the defendants. *Wright & Miller Federal Practice & Procedure*, §2732.2 (Second Edition).

Furthermore, as discussed *infra*, the question of the immunity of the individual defendants in this action involves issues of intent and motive.

"Generally when intent is at issue, a jury should be allowed to draw its own inferences from the undisputed facts unless all reasonable inferences defeat appellants' claims." *Commodity Futures Trading Commission v. Savage*, 611 F. 2d 270, 282-283 (9th Cir. 1979).

The resolution of these complicated issues is clearly more suited to a full trial on the merits. The motion for summary judgment should accordingly be denied on this ground as well.

D. The Existence Of Genuine Issues Of Material Fact Preclude Summary Adjudication Of This Case

As the moving party, Plaintiff has the clear burden of showing the absence of a genuine issue as to any material fact, and therefore the declarations filed in support of the motion must be viewed in the light most favorable to

defendants. Rule 56 (c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598 (1970).

As Defendants' Statement of Genuine Issues of Material Fact demonstrates, there are a number of fundamental disputed issues in this case. There is also a failure on Plaintiff's part to even make a showing with respect to certain elements of their due process argument. Some of the most prominent disputed issues are the knowledge and intent of the individual defendants, the issue of justification of state action, and the availability of timely review of that action.

Thus, in *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972), the Supreme Court reaffirmed a three-part test to determine when it was appropriate for the government to seize property without affording a prior notice and hearing. The three inquiries are: whether the seizure is "directly necessary to secure an important governmental or general public interest", whether there is a need for "prompt, action," and whether the seizure was necessary and justified in the particular instance. While the Declaration of Michael Villeneuve addresses these three points, the moving papers do not. There is a complete lack of evidence submitted on these questions, Plaintiff taking the simplistic and utterly unwarranted position that due process requires a prior notice and hearing in all cases.

The averments of the Declaration of Stephen A. Seidman concerning timeliness of a hearing, for example, are directly controverted by the Declaration of Michael Villeneuve filed in opposition. It is not the function of the Court on summary judgment either to resolve issues of fact based on conflicting expert testimony (*Scharf v. U.S. Attorney General*, 597 F. 2d 1240, 1243) or to resolve a genuine issue of credibility (*Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473, 82 S. Ct. 487 (1962)). These are issues that must be presented to the trier of fact at a full evidentiary hearing.

In summary, plaintiff's hastily constructed motion for summary judgment is premature, defective, and inappropriate, and should be denied for all of these reasons.

E. Plaintiff's Injuries, Consisting Solely of Indirect Adverse Effects of Governmental Action, Are Not Actionable.

Exhibit E to the Declaration of Itai Ben Artzi makes it apparent that plaintiff was a subcontractor with respect to each of the projects in issue. It is indisputable that the only action taken by Defendants, the issuance of the various notices, was taken solely against the prime contractors, who thereafter unilaterally chose to withhold monies from plaintiff for work performed under their subcontracts. By prosecuting this action plaintiff is, in effect, trying to interject itself in a dispute between the prime contractors and the State of California. Defendants accordingly contend that under these facts, plaintiff has no claim for deprivation of due process. The Supreme Court has long held that facts such as those disclosed, in this case cannot constitute a basis for relief under the due process clause.

"Over a century ago this Court recognized the principle that the due process provision of the Fifth Amendment does not apply to the *indirect adverse effects* of

governmental action. Thus, in the *Legal Tender Cases*, 12 Wall. 457, 551, the Court stated:

> 'That provision has always been understood as referring only to a *direct* appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that *indirectly* work harm and loss to individuals.' "

O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 788-789, 100 S. Ct. 2467 (1980) (Emphasis added).

In *O'Bannon* a group of patients sued to prevent a state from cutting off reimbursement of medical expenses to a medical facility where the patients lived without affording members of the group a hearing. The revocation, if upheld, would have required these patients to move to another facility in order to continue to be eligible for medical benefits. While they were all clearly injured by the impending revocation, the Supreme Court held that the detriment the patients experienced was only *indirect* because the action of the state was against the facility and not directly against them. Since they were only indirectly impacted, they could not claim a deprivation of due process because they were denied a hearing. As the Supreme Court took pains to point out, these patients' rights, if any, were against the hospital and not against the public entity.

This fundamental principle of constitutional law, that indirect deprivations of property rights are nonactionable, has been given wide ranging application in a variety of factual situations.

In *Castaneda v. U.S. Department of Agriculture*, 807 F 2d 1478, 1480 (9th Cir. 1987), a store manager sued the Department of Agriculture because that agency had closed the store where he worked as a result of food stamp violations, causing him to lose his job. He claimed he had the right to a hearing prior to such action being taken. Relying on *O'Bannon*, the Ninth Circuit held that Castaneda had no due process claim because he was only indirectly adversely affected by the action of the Department of Agriculture.

In *Grove City College v. Bell*, 687 F. 2d 684, 704 (3rd Cir. 1982), a college refused to execute certain federal forms required under statutes administered by the United States Department of Education, causing that agency to revoke all student loans and aid at the college without affording a hearing to the affected students. Citing *O'Bannon*, the court held that the students had no claim for violation of due process because they were only indirectly affected by the Department of Education's action.

In *Nuclear Transport & Storage, Inc. v. United States*, 890 F. 2d 1348, 1354 (6th Cir. 1989), a radioactive waste storage company was impacted when the U.S. Department of Energy began offering free storage facilities to its customers without granting a hearing prior to taking this action. The court held the company was only indirectly impacted under the reasoning of *O'Bannon* and could therefore state no claim for violation of its due process rights.

There can be no logical distinction drawn between the position of the aggrieved parties in these cases and the position of plaintiff here. The State of California acted

to enforce its contractual and statutory rights solely with respect to the prime contractors. While plaintiff has undoubtedly suffered some initial detriment as a result of these prime contractors' withholding of funds, its rights, if any, are against the prime contractor and not these defendants. Any adverse impact which plaintiff has suffered is clearly indirect within the meaning of *O'Bannon* and its progeny and cannot give rise to a claim of deprivation of due process under the reasoning of those cases.

Based on the facts of this case, it is apparent that plaintiff is, at best, only indirectly impacted by the action of defendants. The motion for summary judgment should therefore be denied.

F. The Due Process Clause Does Not Guarantee Plaintiff A Pre-Deprivation Hearing In This Case

The gravamen of plaintiff's claim is that it was denied a pre-deprivation hearing by defendants in violation of its due process rights. This contention presumes that plaintiff necessarily possessed a constitutional right to a pre-deprivation hearing, a presumption that is unwarranted in light of present day law.

The extent to which the due process clause mandates a hearing prior to the deprivation of property rights was carefully considered by the Supreme Court in *Mathews v. Elridge*, 424 U.S. 319, 333 (1976). That Court made clear that the question of whether a pre-deprivation hearing must be afforded consistent with principles of due process was not a black and white matter. Reviewing the cases on this subject, the Court stated:

"These decisions underscore the truism that 'due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)." Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests affected.

The Court in *Mathews* pointed out that there were three factors which must be balanced to determine the need, if any, for a pre-deprivation hearing: 1. the private interest to be affected: 2. the risk of an erroneous deprivation of interest through the procedures used and the probable value of additional procedural safeguards: and 3. the government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. 424 U.S. at pp. 332-335.

Taking these factors in order, we note that the first factor, the private interest to be affected, is unquestionably an interest, as pointed out hereinabove, that is only indirectly impacted by the State of California, inasmuch as the Defendants' action was directed only to the prime contractors and not to plaintiff. Despite some superfluous references in the Complaint to the rights of the prime contractors, plaintiff cannot stand in the shoes of these entities, entities that are not even before this court.

The interest of the State of California in preserving prevailing wage rates in public works contracts is treated

fully in the Declaration of Michael Villeneuve. Suffice it to say at this point that Defendants' purposes in this area, including both the preservation of workers' economic rights and the prevention of unfair competition among competing contractors, is of compelling importance.

A prime contractor is empowered to bring suit against the contracting agency under California Labor Code Section 1773 for all wages and penalties alleged to have been improperly withheld. In view of the efficient processing of cases in the courts in Southern California through the ubiquitous fast track procedures, (see Villeneuve declarations), this constitutes a timely and appropriate means of review of State action in these cases. Such a remedy is consistent with enlightened concepts of due process.

The Davis-Bacon Act (40 U.S.C. Section 276 (a), et. seq.) requires contractors performing on federal public works projects to pay prevailing wages to their employees. The statute similarly provides for notification by the Department of Labor to the contracting agency to withhold funds without a prior hearing where the Department of Labor has determined that there is a violation of the prevailing rates standards. Due process challenges to this procedure are therefore instructive in this case.

The Court in *Ames Construction Co. v. Dole*, 727 F. Supp. 502 (D. Minn. 1989) reviewed the cases which have examined the validity of this withholding procedure under due process standards.

> "To date, the three courts that have considered whether the government may withhold funds

> from a contractor for suspected violations of the Davis-Bacon Act prior to a hearing have all affirmed the practice. *Fry Bros. Corp. v. HUD*, 614 F. 2d 732 (10th Cir. 1980); *Winzeler Excavating Co. v. Busch*, 694 F. Supp. 362 (N.D. Ohio 1988); *Ray v. United States Department of Labor*, 100 Labor Cases (CCH) 1134 (C.D. Ill. 1984)
>
> In *Fry Bros.*, a subcontractor on a federally-supported housing project brought an action form declaratory and injunctive relief after a dispute arose between it and the federal government under the Davis-Bacon Act. The Court sustained the district court's dismissal of the complaint for failure to state a claim. In a brief opinion, the Court held that "the shut down and withholding of funds is provided for by statute, 40 U.S.C §276a(a), and the corporation had no right to the 'hearing' that it claims was wrongfully denied.' *Fry Bros.*, 614 F. 2d at 734.
>
> In *Winzeler*, a contractor sought declaratory and injunctive relief alleging that the withholding of government contract funds prior to a hearing on alleged prevailing wage rate infractions constituted a violation of due process. Plaintiff argued that the Davis-Bacon Act was unconstitutional not only because it failed to provide a hearing before the payment suspension, but also because it contained no provision for a prompt hearing *after* the suspension. The Court in *Winzeler* noted that plaintiff was forced to wait *more than two years* for a hearing and determination while funds were suspended. The Court therefore considered whether the failure to mandate a hearing within a specified time period made Winzeler's deprivation more than a 'temporary' loss of income. The Court

declined, however, to impose timing restrictions upon the Department of Labor because to do so would 'have a disruptive effect on the administrative process.' *Winzeler*, 694 F. Supp. at 367. The Court concluded that the contractor's loss was only temporary, in spite of 'long delays in the administrative process,' *id.* at 368, and that due process concerns would be satisfied by a hearing any time before final deprivation. *See also McCasland v. United States Postal Service*, 82 Labor Cases (CCH) § 33,607 (N.D.N.Y.1977) (similar withholding procedures in the Service Contract Act, 41 U.S.C. §351 not unconstitutional despite lack of notice and an opportunity for adversary hearing prior to withholding; *Ray v. United States Department of Labor*, 10 Labor Cases (CCH) 1134 (C.D.Ill.1984)).

In *Blackhawk Mining Co. Inc. v. Andrus*, 711 F. 2d 753 (6th Cir.1983), the United States Court of Appeals for the Sixth Circuit sustained a similar provision of the Surface Mining Control and Reclamation Act requiring prepayment of proposed penalty assessments into escrow as a condition for administrative review. The Court found that the potential deprivation for plaintiff was 'slight and significantly less than that of the welfare recipient in *Goldberg v. Kelly*, *id.* at 757, noting that the Act required reimbursement of improperly assessed penalties within thirty days with interest. The Court found that the plaintiff's interest in having use of these funds for this period of time was 'not of sufficient magnitude to overcome the government's interest.' *Id.* The Court also noted that the risk of an erroneous deprivation of plaintiff's property interest

was slight, finding that plaintiff had the opportunity to submit written information and the right to an informal conference.

Finally, the Court noted that the Government's interest in prompt assessment and collection of civil penalties to assure compliance with the act was substantial, finding that the prepayment requirement was adopted "to avoid the problem of the noncollection of fines and to discourage delay of the collection process through frivolous appeals.' The Court noted that the statute entitled the operator to formal review of the citation and amount of penalty within thirty days of receipt of the notice of violation, including a full adversarial evidentiary hearing before an ALJ. 30 U.S.C §1268(c); 43 C.F.R. § 4.1152(b)(1). *Accord B & M Coal Corp. v. Office of Surface Mining Reclamation and Enforcement*, 669 F. 2d 381 (7th Cir.1983).

The Court finds that section 276a comports with the requirements of *Fuentes* for a prehearing seizure of property. The issue under *Fuentes* is the importance of the governmental interest. The purpose of the Davis-Bacon Act is to assure that workers on public construction projects are paid prevailing wage rates established for private industry. *McDaniel v. University of Chicago*, 548 F. 2d 689, 693 (7th 1977). As the Supreme Court stated in *United States v. Binghamton Construction Co. Inc.*, 347 U.S. 171, 174 74 S. Ct. 438, 440 98 L.Ed. 594 (1954):

> The language of the [Davis-Bacon] Act and its legislative history plainly show that it was not enacted to benefit contractors rather to protect their employees from substandard earnings, fixing a floor under

> wages on government projects. . . . On its face the Davis-Bacon Act is a minimum wages law designed for the benefit of construction workers.
>
> *Id.* at 176-78, 74 S.Ct. at 441-42. The government here also argues that the importance of Davis-Bacon enforcement lies in the protection of the federal contract bidding process. According to defendant, one of the purposes of the Davis-Bacon Act is to assure that contractors are not given unfair advantage over other contractors based upon cheap labor, and that if a contractor is able to ignore Davis-Bacon requirements, it may deliberately underbid to win the contract. The Court finds that the government's interest here is sufficiently 'important' to warrant preheating suspension.

727 Fed. Supp. at 507-508 (emphasis added).

Based on this line of cases, the Court in *Ames Construction* likewise reasoned that the withholding of funds from the contractor without prior notice or a hearing was not violative of due process given the circumstances before it.

This reasoning is consistent with the purposes and concerns supporting the California law, as specified in the Declaration of Michael Villeneuve filed in opposition to Plaintiff's motion, i.e. the preservation of employees wages, etc., especially since those purposes and concerns reflect unquestionably sound public policy

Under the circumstances reflected in the moving papers, it is apparent that the procedures afforded by Defendants for post-deprivation review by the courts of

the validity of the withholding of wages and penalties is not violative of due process.

G. The California Public Works Statutory Scheme Which Recognizes A Contractual Relationship Between The Awarding Body And The Prime Contractor, Does Not Recognize Privity Of Contract With Subcontractors, and, Thus, State Law Does Not Recognized A Right In A Subcontractor To Claim Money Due Under A Contract Between An Awarding Body And A Prime Contractor

The California courts have consistently held that the right of a subcontractor to recover sums it alleges are due for work performed on a public works project is limited to the rights it has under the stop notice provisions of the California Civil Code. *Cal-Pacific Materials Co. v. Redondo Beach City School District* (1979) 94 Cal.App.3d 652, 655. The *Cal-Pacific* court described the doctrine of privity of contract and explained the remedies available to a subcontractor or materialman:

> "School District contracted with Willens [the prime contractor] and not with Cal-Pacific. Cal-Pacific sold its materials to Western States, Willen's subcontractor, and not to School District. Lack of privity thus precludes recovery by Cal-Pacific unless recovery is permitted because of the stop notice." *Cal-Pacific Materials, supra*, at 656.

In dealing with the prevailing wage statutes, privity of contract is required in order to recover sums "forfeited" by the prime contractor as a result of the failure of that contractor "or by any subcontractor under him or

her" to pay the prevailing wage. As described below, the statutory scheme provides only that the prime contractor (or his assignee) has the right to recover the sums withheld *under the contract*.

H. G&G Does Not Have Standing To Bring This Action To Remedy Rights Under These Public Works Contracts Since It Was Not A Party To Those Contracts

The constitutional provision defining the judicial power of the United States extends the power to cases arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority.

> "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise . . . In both dimensions it is founded in concern about the proper – and properly limited – role of the courts in a democratic society. The constitutional limits on standing eliminate claims in which the plaintiff has failed to make out a case or controversy between himself and the defendant. In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979).

In this case, where the gravamen of G&G's action is an effort to have the provisions of the Labor Code dealing with the withholding of sums from the general or prime contractor declared unconstitutional as applied to plaintiff, there must be a deprivation of some right which inures to a contractor in G&G's position as a result of the actions by the state agency. But, as pointed out above, G&G has no right to the money withheld by the awarding body and, consequently, can suffer no "injury" attributable to the state or its agencies.

Again, in sum, what G&G's allegations fail to establish is that it has any standing to recover the monies withheld by the awarding body pursuant to the contract between the awarding body and the prime contractor – a contract which does not benefit or relate to G&G. Specifically, G&G asks that this court declare Code §§1727, 1729, 1730, 1732, 1733 and 1775 unconstitutional. But pertinent Labor Code sections cited above have no affect on subcontractors performing public works in California. The cited sections constitute the statutory scheme in California designed to enforce the prevailing wage law through withholding from sums due to *prime contractors under the contract* when they are contracting with awarding bodies. Pursuant to § 1727, for instance, "Deficiencies and penalties are to be withheld by the awarding body from sums due *under the contract*." *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 986. (Emphasis added) Labor Code §§ 1730 provides that the awarding body is to transfer all wages and penalties that have been withheld pursuant to § 1727 (i.e., under the contract) to the Labor Commissioner. Labor Code § 1732 provides the time frame within which the prime contractor (or his assignee)

must bring and action to recover the sums withheld. The action is to be "on the contract for alleged breach thereof in not making the payment" and this suit is "the exclusive remedy" of the contractor or his assignee. Section 1733 provides that the burden of proof is upon the "contractor or his or her assignee to establish his or her right to the wages and penalties withheld."

Under the clear language of the California Prevailing Wage law it is the contractor who bears liability for wage underpayments made by subcontractors. (Labor Code § 1775) This interpretation comports with case law. In *O. G. Sansone v. Department of Transportation* (1976) 55 Cal.App.3d 434, the prime contractor subcontracted a portion of a public works project to a subcontractor, who then subcontracted a portion of his work. Neither subcontractor paid the prevailing wage to its workers. The state withheld payment to the general contractor to cover the underpayment and the Court of Appeal concluded that this was proper:

> "Plaintiffs entered into a contractual agreement to the effect that they would comply with . . . section 1775 and that they would forfeit to the state $25 per day for each workman paid less than the prevailing wage by either plaintiffs or by their subcontractors, as well as pay to each workman the difference between the prevailing wage and the amount the workman had received. Thus, when [the] subcontractors . . . failed to pay prevailing wages to their workmen, plaintiffs became contractually liable to pay the penalty to the state as well as to pay the wronged workmen the difference in wages." *Id.*, at 462-463.

I. Even If The Plaintiff Had Standing On Behalf Of The Prime Contractors To Question The Actions of The State In Ordering The Withholding Of Unpaid Wages, The Attack On Constitutional Grounds Must Fail

Even if G&G were allowed to attack the constitutionality of the statute in the stead of the prime contractors, G&G would be in no better position than those it would then represent. There is little doubt that the prime contractors who entered into the contracts with the awarding bodies have benefitted from the fact that they did business with the State under the terms of the Act. These contractors would now be estopped to bring an action to test the constitutionality of the statutory scheme which allows the awarding body to withhold sums due under the contract. The admonition of the U.S. Supreme Court in the case of *Fahey v. Mallonee*, 332 U.S. 245, 255 (1947) would be appropriate:

> "It is an elementary rule of constitutional law that one may not retain the benefits of the Act while attacking the constitutionality of one of its important conditions. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.' "

See also *Foster v. Superior Court*, 26 Cal.App.2d 230, 234, *Tracy v. McIntyre*, 29 Cal.App.2d 145, and *Madonna v. State of California*, 151 Cal.App.2d 836.

J. The Individual Defendants Are Immune From Suit In This Action

Up until recently plaintiff has forborne from suing agencies of the State of California in this case and has named solely the following public officials: Victoria Bradshaw, as the Labor Commissioner, Lloyd W. Aubry, Jr., as the Director of the Department of Industrial Relations, Daniel Dellarocca, as a Deputy Labor Commissioner, Roger Miller, as a Deputy Labor Commissioner, and Rosa Frazier, as a Deputy Labor Commissioner.

It is well settled that a qualified immunity shields public officials whose conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person must have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982); *Anderson v. Creighton*, 483 U.S. 635, 639-640, 107 S. Ct. 3034 (1987); *Erickson v. U.S.*, 976 F. 2d 1299, 1301 (9th Cir. 1992). It is apparent from those cases that the determination of whether qualified immunity exists does not take place in a vacuum. "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken . . . " *Anderson v. Creighton* at 639.

In determining whether a 'clearly established right' existed, the courts must "survey the legal landscape" as it existed at the time of the alleged violation. *Figueroa v. U.S.*, 7 F.3d 1405, 1409 (9th Cir. 1993); *Wood v. Ostrander*, 879 F. 2d 583, 591 (9th Cir. 1989), certiorari denied 493 U.S. 938.

The declarations filed in support of the motion contain no factual averments that some "clearly established" right was violated by these individual defendants. In *Erickson v. U.S., supra*, the Court stated:

> "We have divided the qualified immunity analysis into three inquiries:
>
> (1) the identification of the specific right allegedly violated: (2) the determination of whether that right was so "clearly established" as to alert a reasonable officer to its constitutional parameters; and (3) the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue."
>
> * * *
>
> "As the Supreme Court has explained herein, if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to 'objective legal reasonableness' that is the touchstone of Harlow [v. Fitzgerald]. Plaintiffs would be able to convert the rule of qualified immunity into a rule of mutually unqualified liability simply by alleging violation of extremely abstract rights . . . It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Anderson v. Creighton, 483 U.S. 635, 639-40, 107 S. Ct. 3034, 3038-39, 97 L.Ed. 2523 (1987): Even if

> Erickson had identified the rights involved with requisite specificity, however, we are aware of no authority that clearly establishes a constitutional right against the kind of official conduct involved in this case." *Erickson v. U.S.* at 1301.

Plaintiff has not cited and cannot cite any case that stands for the proposition that Sections 1727-1731, 1774, 1775, 1777.5 or 1815 are unconstitutional because no court has so held. Officials who implement and enforce these provisions like the individual defendants named herein, have the right to assume these provisions are valid until some court tells them otherwise.

While it has been held not to be necessary for the conduct in question to be previously declared unconstitutional to be found inimical to "clearly established law," the unlawfulness of the public official must have been apparent in light of preexisting law. *Anderson v. Creighton*, supra, 483 U.S. at 640.

It appears at most that the individual defendants merely issued certain notices to awarding bodies who had contracted with the prime contractors regarding the plaintiff's failure to pay prevailing wages without giving a prior hearing to plaintiff.

To argue that actions such as these are outside the scope of qualified immunity is to lose sight of the fundamental policy underlying this well-established doctrine. "The general rule of qualified immunity is intended to provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages'. *Davis* 468 U.S. at 195. Where that rule is applicable, officials can know that they will not be held

personally liable as long as their actions are reasonable in light of current American law. That security would be utterly defeated if officials were unable to determine whether they were protected by the rule without entangling themselves in the vagaries of English and American common law." *Anderson v. Creighton* at p. 646.

In fact the Supreme Court has gone so far as to declare that the qualified immunity defense "provides ample protection to all but the plainly incompetent or those who knowingly violate the law". *Malley v. Briggs*, 475 U.S. 335, 341, (1968).

How can plaintiff contend that these officers have violated "clearly established statutory or constitutional rights of which a reasonable person must have known", when the sole and express purpose of this lawsuit is to persuade this court to declare, for the first time, that a due process right to a pre-deprivation hearing exists under the circumstances alleged in the complaint? This is after all, an area of the law where, as the Supreme Court tells us, concepts are "flexible" and vary depending on the particular fact situation confronting the court. *Morrissey v. Brewer, supra*, 408 U.S. at 481.

Even if plaintiff were to prevail in its aforementioned constitutionality argument, a position defendants vigorously dispute, there is nothing in the moving papers to show that these individual defendants were doing anything more than performing their legislatively assigned duties in enforcing and implementing provisions of the California Labor Code and could have no reason to believe that these provisions were unconstitutional in any respect.

K. This Is Not An Appropriate Case For Injunctive Relief Because Plaintiff Has An Adequate Remedy At Law

Plaintiff seeks injunctive relief, stating in conclusionary terms that it has suffered irreparable injury and has no adequate remedy at law. (See Declaration of Itai-Ben Artzi). But these averments show that what is in dispute here is no more than a sum of money which has been withheld from plaintiff by the prime contractors due to the actions of defendants in posting certain notices.

It is significant that the prayer requests not simply status quo relief, but a mandatory injunction preventing defendants "from enforcing, or threatening to enforce, the provisions of California Labor Code && 1727, 1729, 1775 or 1776 against Plaintiff, or any other person, with regard to any 'public works' project, including, without limitation, imposing, or threatening to impose, civil penalties against any person, including Plaintiff; issuing Notices to Withhold with regard to Plaintiff and/or any other person . . . " Plaintiff is asking for nothing less than a mandatory injunction to accomplish a complete shutdown of the statutory scheme with respect to both itself and all other persons.

To obtain injunctive relief in the federal courts, a plaintiff must demonstrate that his remedy at law is inadequate. *Stanley v. University of Southern California*, 13 F. 3d 1313, 1320 (9th Cir.1994). It must also demonstrate that "it will be exposed to some significant risk of irreparable injury." *Associated General Contracting Co. v. Coalition for Economic Equity*, 950 F. 2d 1401, 1410 (9th Cir. 1991)

certiorari denied 112 S. Ct. 1671; *Caribbean Marine Service Co. v. Baldridge*, 844 F 2d 688 (9th Cir. 1988).

There is nothing about this case as disclosed in the declarations that separates it from a garden variety action for monetary damages or justifies the disfavored remedy of a mandatory injunction.

CONCLUSION

Plaintiff's moving papers are deficient in two principal respects, *i.e.*, critical averments of fact are absent and the remaining averments are directly disputed by the opposing declarations. Plaintiff is therefore unable to show that there is no genuine issue of fact and that it is entitled to judgment as a matter of law. Defendant therefore respectfully requests that the motion for summary judgment be denied.

DATED: October 23, 1995

Thomas S. Kerrigan
Michael Villeneuve
DIVISION OF LABOR
STANDARDS ENFORCEMENT
Department of Industrial
Relations
State of California

/s/ Thomas S. Kerrigan
THOMAS S. KERRIGAN
Attorney for Defendant

(Declaration Of Service Omitted In Printing)

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Department of Industrial Relations
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	CASE NO. 95-4839 R (BQRx) STATEMENT OF GENUINE ISSUES OF MATERIAL FACT DATE: November 6, 1995 TIME: 10 a.m. Courtroom: No. 8 (Filed Oct. 23, 1995)

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20, Defendants.	

Defendants, through their counsel of record in this action, Thomas S. Kerrigan and Michael S. Villeneuve, pursuant to Local Rule 7.14.2, submit the following Statement of Genuine Issues of Material Fact:

1. The Division of Labor Standards Enforcement, the agency mandated to enforce the prevailing wage requirements of the California Public Works Law (California Labor Code Sections 1730-1815) has interpreted the purposes of that Act to be to benefit workers and to prevent unfair competition in the construction industry.

(Declaration of Michael S. Villeneuve, Page 2, lines 14-19)

2. Prior to the issuance of a Notice to Withhold, each Deputy Labor Commissioner undertakes an investigation of the facts of the alleged violation and then submits his findings to the Senior Deputy Labor Commissioner for authorization to issue the Notice. The Senior Deputy must determine that there has been a violation of the law before approving issuance of the Notice.

(Exhibit 4 to Declaration of Stephen Seideman (Miller Depo. Pages 34-35, 179); (Garza Depo. Pages 63-64)

3. The issuance of Notices to Withhold ensures the timely collection of wages owed to employees.

(Declaration of Michael S. Villeneuve, Page 2, line 20-Page 3, line 28)

4. G & G Fire Sprinklers, Inc. acted solely as a subcontractor on the projects in question in this action.

(Declaration of Itai Ben-Artzi, Exhibits 2A-2D)

5. G & G Fire Sprinklers, Inc. was only indirectly impacted by the issuance of the complained of Notices to Withhold, these Notices having been issued directly to the prime contractor.

(Declaration of Itai Ben-Artzi, Exhibits 2A-2D)

6. Prevailing wage suits filed in the Southern California courts under the "fast track" rules and procedures generally come to trial within nine to 15 months after such filing.

(Declaration of Michael S. Villeneuve, Page 4, lines 1-27)

7. Enforcement of the California Public Works Law has resulted in the collection of millions of dollars in unpaid wages for California construction workers, and has further led to enforcement of the State of California's labor standards.

(Declaration of Michael S. Villeneuve, Page 4, line 28-Page 5, line 15)

8. The State of California has a legitimate and compelling interest in enforcing its procedures under the California Public Works Law.

(Declaration of Michael S. Villeneuve, Page 1, line 14 to Page, line 28)

9. The California Public Works Law and the policies and procedures promulgated thereunder have repeatedly withstood constitutional and other legal attacks.

(Declaration of Thomas S. Kerrigan, Page 2)

10. The parties to this action have neither had an Early Meeting of Counsel pursuant to Local Rule 6 nor engaged in any discovery.

(Declaration of Thomas S. Kerrigan, Page 2)

Dated: October 23, 1995

Thomas S. Kerrigan
Michael S. Villeneuve
DIVISION OF LABOR LAW ENFORCEMENT
Department of Industrial Relations
State of California

By: /s/ Thomas S. Kerrigan
Thomas S. Kerrigan
Attorney for Defendants

DIVISION OF LABOR STANDARDS ENFORCEMENT
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	CASE NO. 95-4839 ER (BQRx) DECLARATION OF THOMAS S. KERRIGAN IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT Date: November 6, 1995 Time: 10 a.m. Courtroom: No. 8 (Filed Oct. 23, 1995)

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20, Defendants.	

I, Thomas S. Kerrigan, declare and say:

1. I was admitted to the California Bar and the United States District Court for the Central District of California in 1965. I remain licensed to practice before all courts in the state of California.

2. Since May of 1995 I have been employed by the State of California, Department of Industrial Relations, Division of Labor Standards Enforcement as a Staff Attorney. I am one of the attorneys for defendants herein.

3. This action was filed on July 21, 1995. Defendants filed a timely motion to dismiss pursuant to Rule 12(b) on August 16. Thereafter, on September 7, plaintiff filed a First Amended Complaint. Defendant filed a second motion to dismiss on September 19, noticing that motion for a hearing on November 6. Plaintiff subsequently personally served the present motion for summary judgment on October 16, giving defendants the minimum notice sanctioned by Local Rule 7.4.

4. Neither party has engaged in any discovery in this case. There has been no Early Meeting of Counsel pursuant to Rule 6 of the Local Rules.

5. As a Staff Attorney for the Division of Labor Standards Enforcement, I am charged with keeping current on the status of the various provisions of the California Labor Code and advising the Deputy Labor Commissioners employed by the Division concerning the legal effect of these provisions. To my knowledge, none of the provisions of the California Public Works Law has been declared unconstitutional or otherwise invalid by any court.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 23rd day of October, 1995 in Los Angeles, California.

DATED: October 23, 1995

Thomas S. Kerrigan
Michael Villeneuve
Division of Labor Standards
Enforcement
Department of Industrial Relations
State of California

/s/ Thomas S. Kerrigan
THOMAS S. KERRIGAN
Attorney for Defendants

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
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Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	CASE NO. 95-4839 R (BQRx) DECLARATION OF MICHAEL S. VILLENEUVE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT Date: November 6, 1995 Time: 10 a.m. Courtroom No. 8 (Filed Oct. 23, 1995)

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

I, MICHAEL S. VILLENEUVE, declare and state:

1. If called upon to testify to the matters set forth hereinafter, I would competently testify thereto, based on my own personal and direct knowledge.

2. I am a member in good standing of the State Bar of California, and have been licensed to practice before the Courts of the State of California since 1978. I have been admitted to practice before the United States District Court for the Central District of California since April 27, 1989.

3. I am employed by the State of California, Department of Industrial Relations, Division of Labor Standards. My duties include handling all public works cases for all counties south of Fresno.

4. The Division of Labor Standards Enforcement, the agency mandated to enforce the prevailing wage requirement of the California Public Works Law (California Labor Code §§ 1730-1815) has interpreted the legislative purpose of this Act to be to benefit workers and to prevent unfair competition in the construction industry.

5. Over the last two and a half years, I have been assigned to handle litigation in several public works cases where there have been difficulties in enforcing prevailing wage violations against the payment bond. In some cases the public works entity or awarding body which let the contracts failed to require the posting of the bond. In other cases, the bond was "issued" by phony Cayman Island companies which where [sic] not registered to do business by the California State Insurance Commissioner. In many of those cases, there were no assets to back up the bond, and the unpaid wages and penalties were uncollectible. In at least two other cases the surety company which issued the payment bonds were insolvent, and/or in receivership. In at least one other case a Superior Court Judge in Arizona issued an order purporting to enjoin any proceedings against the surety company which issued the bond.

6. Nor is it always feasible to enforce the prevailing wage statutes against the general contractor after the project has been completed and the public funds disbursed. I have been a labor attorney with a major emphasis in construction related cases for well over fifteen (15) years. It has been my experience that the vast majority of construction contractors, especially the smaller contractors, are undercapitalized, and may have virtually no assets. It is not uncommon for these contractors, may [sic] of whom have incorporated, to cease doing business the minute a claim for unpaid wages comes forth, only to reopen under a different corporate entity the next day. Any equipment, vehicles, tools or other assets are usually held in the name of a third party, and leased to the contractor. The contractor need only post a

bond in the amount of $7500 (until recently it was only $5000) against wage and other claims. The premium for these bonds is very small. The priority for wages is only $4000, is subject to pro ration with all valid wage claims from all projects, and is subject to a set off of attorneys' fees in the event the bond proceeds are the subject of an interpleader action, a common occurrence. It is quite often that the remainder would be insufficient to cover the legal fees incurred in proceeding against such a bond.

7. In a previous case, plaintiff G & G Fire Sprinklers, Inc. (hereinafter referred to as "G & G") was a subcontractor on a project at UCLA. The Notice to Withhold was served on the University and the General Contractor, American Constructors, California, Inc. (hereinafter referred to as "ACCI") in late May, 1994. After service of the summons and complaint against the Regents in late May, 1994, counsel for the Regents tendered the defense of the lawsuit to me. The matter was set for trial on April 24, 1995, less than a year after service of the summons and complaint.

8. Due to "fast track" rules and procedures in most state courts, it has been my experience that most of these lawsuits go to trial, if they are not settled or disposed of by pretrial motions within nine to fifteen months after filing. Although the cases are not entitled to any statutory priority in case setting, the parties to these actions are usually successful in obtaining early trial dates, based on the acknowledged need to obtain prompt payment of wages, and the contractor's wishes to have the case resolved as soon as possible, so that any of the withheld funds which are not found due under the statute as either wages, penalties, costs or attorneys' fees can be remitted

to the contractor. The state courts have unerringly been receptive to the setting of the earliest possible trial dates in these cases. I have read the Declaration of Stephen A. Seidman [sic] filed in support of the Motion for Summary Judgment and strongly disagree with his estimate regarding the time it takes to go to trial in these cases.

9. During the past three years I have been the lead counsel in approximately two hundred fifty public works cases. Every case but one resulted in either a judgment or a settlement wherein wages were remitted to DLSE for disbursement to employees. In the once case referred to, DLSE voluntarily dismissed the case upon review of documents produced in discovery. In the last fiscal year, my office has collected approximately one and a half million dollars in unpaid wages and penalties (the substantial majority of this money was for unpaid wages). It is my understanding that the numbers and results are virtually similar in Northern California, demonstrating a substantial problem with obtaining compliance by contractors, and highlighting the state's need to utilize the withhold [sic] provisions of the public contracts with construction contractors in order to enforce those contracts, and thus uphold the state's minimum wage standards.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 23rd day of October 1995 at Los Angeles, California.

/s/ Michael S. Villeneuve
MICHAEL S. VILLENEUVE

DIVISION OF LABOR STANDARDS ENFORCEMENT
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	CASE NO. 95-4839 R (BQRx) OBJECTIONS TO DECLARATIONS FILED IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT [FRCP56(e) Date: November 6, 1995 Time: 10 a.m. Courtroom: No. 8 (Filed Oct. 23, 1995)

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

Defendants object to the Declarations of Itai Ben-Artzi and Stephen A. Seideman, pursuant to the provisions of Rule 56(e) of the Federal Rules of Civil Procedure, based on each of the following grounds:

Declaration of Itai Ben-Artzi

Page 1, lines 15-25	Lack of foundation, lack of personal knowledge.
Page 2, lines 19-21	Lack of foundation, lack of personal knowledge.
Page 2, lines 22-28	Lack of foundation, lack of personal knowledge.
Page 3, lines 1-11	Lack of foundation, lack of personal knowledge.
Page 5, lines 1-14	Lack of foundation, lack of personal knowledge, conclusionary, speculative

Declaration of Stephen A. Seideman

Page 1, Line 28-Page 2, line 8	Lack of foundation, lack of personal knowledge, speculative.
Page 2, lines 6-17 (and attached exhibits)	Lack of foundation, hearsay

DATED: October 24, 1995

Thomas S. Kerrigan
Michael Villeneuve
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	CIVIL NO. 95-4839 R PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT **The Honorable Manuel L. Real** DATE: 11-06-1995 TIME: 10:00 a.m. DEPT: Courtroom 8, U.S.D.C. 312 N. Spring St. Los Angeles, CA 90012

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

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I. INTRODUCTION

Plaintiff hereby replies to Defendants' opposition to Plaintiff's motion for summary judgment.

Defendants' opposition raises, essentially, four points. Defendants argue that (1) the motion is premature, (2) there is a triable issue of fact, (3) the statutory procedure. complies with due process, and (4) Plaintiff does not have standing to raise the issue. Each of the aforesaid contentions is without merit for the reasons set

forth in the moving papers, and as further set forth below.

II. THE MOTION IS NOT PREMATURE

Plaintiff's motion is not premature. Rule 56 allows a motion for summary judgment to be made any time more than twenty days after commencement of the action.

Plaintiff filed a similar lawsuit against Defendants previously. Plaintiff made, essentially, the same motion in the prior case. The prior motion relied on the same authorities cited in the moving papers herein. Thus, Defendants' counsel was aware of the argument and authorities for at least six months before this motion was filed.

There is no discovery needed by Defendant to oppose this motion Defendants' opposition does not identify any discovery which is necessary to oppose the motion. The motion raises an issue of law as to the constitutionality of statutes, and the application thereof. There is no dispute as to the statutory procedures in question. There is no discovery required to address the issue.

III. THE ISSUE IS APPROPRIATE FOR SUMMARY JUDGMENT

The issue raised is a matter of law. Therefore, it is appropriate for summary judgment. There have been numerous cases in which due process challenges have been resolved by summary judgment. (*See*, e. g., *U.S. v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492,

126 L.Ed.2d 490 (1993); *Bailey v. Secretary of the United States Department of Labor* 810 F.Supp. 261 (D.Alaska 1993). There is no need for a trial to resolve an issue of law.

IV. THERE IS NO TRIABLE ISSUE OF FACT

The opposition papers do not raise any triable issue of fact. The purported triable issue of fact asserted by Defendants is the time needed to reach trial in a state court case filed under *Cal. Labor Code* § 1730 et. seq. There is no triable issue of fact in this regard, nor at all.

A. There is no triable issue of fact as to the time for a trial

Defendants assert that Plaintiff's statement as to the time required for a trial in state court is incorrect. Defendants assert that lawsuits filed in state court under *Cal. Labor Code* § 1730 et. seq. are set for trial within nine to fifteen months of filing (*see*, Defendants' Statement of Genuine Issues of Material Fact). The procedure is unconstitutional, even if Defendants' assertion of the fact is accepted as true. Therefore, there is no issue of material fact. The procedure violates due process, even accepting Defendants facts, for the following reasons (which are discussed more fully in other parts of the moving and reply papers): (1) The right to a hearing nine to fifteen months after the deprivation is not a prompt post-deprivation hearing, (2) even after a judgment in favor of the contractor, the money remains held pending appeal, (3) a

pre-deprivation hearing is required, and (4) a subcontractor aggrieved by a notice to withhold has no right to a hearing at any time.

If any of the four points set forth above is correct, Plaintiff is entitled to summary judgment. Since the procedure is unconstitutional, even accepting Defendants facts, there is no genuine issue of material facts. The Court may accept as true Defendants' assertions that a trial may be had within nine to fifteen months.

B. The other assertions in Defendants' Statement of Genuine Issues of Material Fact do not raise any triable issue of fact

The other assertions of fact by Defendant do not raise any triable issue of fact. The declaration of Michael Villeneuve states that many contractors are undercapitalized, and easily forced out of business by a notice to withhold. The declaration also states that of two hundred and fifty notices to withhold all but one resulted in a settlement or judgment wherein some money went to DLSE. Even if true, the aforesaid assertions do not render the procedure consistent with due process. To the contrary, the aforesaid facts support Plaintiff's contention. The aforesaid facts underscore the manner and extent to which DLSE can coerce settlements from contractors by withholding money without a hearing. (For example, the two hundred fifty cases include those which Plaintiff settled wherein almost all the money was released, but DLSE kept a small portion. Although Plaintiff denied the merits of the claim by DLSE, the settlement was made because of the need for the money being released, and the

cost to litigate would exceed the amount forfeited to DLSE).

The declaration also vaguely states that of two hundred fifty cases, there were "several" in which there were difficulties in collection on the surety bond. This statement does not raise any triable issue of fact. The fact that a few cases may arise out of hundreds wherein there may be difficulty with a surety bond does not justify a procedure of wholesale withholding without a hearing. Also, the stop notice procedure under the California Civil Code may be used to secure funds claimed as wages. Furthermore, there is no prompt post-deprivation hearing in any event.

Finally, defendant asserts that the State has an important interest in enforcing the prevailing wage law. The aforesaid assertion is merely argument, and does not raise any issue of fact. Furthermore, Plaintiff has not disputed that the State has an interest in enforcing it's prevailing wage law. Plaintiff merely asserts that such enforcement must be done in a constitutional manner. A State always has an interest in enforcing it's laws. Nevertheless, the mandates of due process must be observed.

Defendant has not raised any triable issue of fact. Summary judgment is appropriate.

V. THE OPPOSITION DOES NOT REBUT THE CONTENTION THAT THE PROCEDURE DOES NOT COMPLY WITH DUE PROCESS

In opposition Defendants assert that due process does not require a pre-deprivation hearing. The opposition is without merit because (1) there is no prompt

post-deprivation hearing, therefore, the procedure in [sic] unconstitutional whether a pre-deprivation hearing is required or not, (2) an aggrieved subcontractor has no right to a hearing at any time, and (3) a pre-deprivation hearing is required.

Defendants rely on *Mathews v. Elridge* 424 U.S. 319 (1976) and *Ames Const. v. Dole* 727 F.Supp. 502 (D. Minn. 1989). Defendants' reliance on these cases is misplaced.

A. *Mathews* does not establish that no pre-deprivation hearing is required

Mathews did not concern the question of whether a predeprivation hearing was required, but rather the type of hearing. In this case, the procedure provides for no pre-deprivation hearing of any type. Therefore, *Mathews* is inapplicable. Defendants are correct that the type of hearing required may vary with the circumstances. For example, in *U.S. v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) the court held that with regard to seizure of property used for drug dealing, an ex parte hearing before a federal magistrate was not a sufficient hearing. Since no hearing of any type is provided for under the California Labor Code, the procedure is clearly unconstitutional.

Furthermore, *Mathews* is distinguishable for a number of other reason [sic].

Mathews concerned termination of disability benefits. In *Mathews* there was a pre-deprivation procedure mandated whereby the evidence supporting termination was forwarded to the recipient, and an opportunity to offer

other evidence provided. There is no such procedure under, the Cal. Labor Code.

In *Mathews* the decision was based on a medical determination of disability, which was made by a doctor. The government official making the eligibility determination did not make the medical determination of disability. There is no such independent objective determination with regard to the issuance of a notice to withhold.

In *Mathews* there were extensive post-deprivation procedures providing for prompt review of the decision. There is no such procedures [sic] in this case.

In *Mathews* the only issue was the existence of a medical disability. In this case the issue is not merely the existence of a violation, but the amount thereof. A hearing is necessary to determine the correct amount of withholding.

Mathews did not involve the imposition of punitive sanctions, as does this case. Thus, the holding in *U.S. v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) is applicable to this case.

The Supreme Court has repeatedly stated that due process requires a pre-deprivation hearing for a temporary deprivation, except in emergency circumstances for which a prompt post-deprivation hearing is required. This requirement was recently reiterated in *Daniel*. *Mathews* merely stands for the proposition that where a pre-deprivation hearing is required, it need not be a full judicial type hearing in all circumstances. Since there is no pre-deprivation hearing at all under the procedure in

this case, *Mathews* is not applicable. *Mathews* does not rebut the points set forth in Plaintiff's moving papers.

B. Defendants' reliance on *Awes Const. v. Dole* is misplaced

Defendants cite *Ames Const. v. Dole* 727 F.Supp. 502 (D.Minn. 1989). *Ames* supports Plaintiff's position. In *Ames* the court held that withholding money on account of alleged prevailing wage violations was a deprivation of property requiring due process. *Ames* held that withholding without a prompt post-deprivation hearing was unconstitutional. The procedure in California does not provide for a prompt post-deprivation hearing. Therefore, under the reasoning of *Ames*, it is unconstitutional.

In finding a pre-deprivation hearing was not required, the *Ames* court did not consider the distinction between cases where there is an independently established objective fact which is the basis of the action. As the court explained in *Chalkboard v. Brandt* 902 F.2d 1375, 1381 (9th Cir. 1989), the need for a predeprivation hearing is less in such cases, since the likelihood of mistake is small. *Ames* relied on *Barry v. Barachi* 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979) and *Federal Deposit Insurance Corporation v. Mallen* 486 U.S. 230, 108 S.Ct. 1780, 100 L.Ed.2d 265 (1988). *Barry* involved a procedure providing for suspension based on a chemical drug test, and *Mallen* based on a criminal indictment. In each of said cases the Court held a pre-deprivation hearing was not required, but the procedure must provide for a prompt post-deprivation hearing. As stated in *Mallen*, "an important

governmental interest, *accompanied by a substantial assurance that the deprivation is not baseless or unwarranted,* may in *limited cases demanding prompt action* justify postponing the opportunity to be heard until after the initial deprivation." *Mallen* 108 S.Ct. at 1787.

In *Mallen* and *Barry* there was an independent objective determination to provide substantial assurance that the deprivation was not baseless, i.e. chemical test or criminal indictment. The court in *Ames* failed to consider this important distinction.

The aforesaid point was made clear in *U.S. v. James-Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), wherein seizure of property used for drug dealing after ex parte hearing (with full hearing later) was held unconstitutional. The court stated that "the practice of ex parte seizure, moreover, creates an unacceptable risk of error."

Subsequent to *Ames*, the court in *Bailey v. Secretary of the United States Department of Labor* 810 F.Supp. 261 (D.Alaska 1993) held that a pre-deprivation hearing was required for withholding due to alleged violations of the prevailing wage law.

The ruling in *Ames* that no pre-deprivation hearing was required should not be followed for the reasons stated above, and in the moving papers. Moreover, even under the reasoning of *Ames* the procedure herein is unconstitutional, as there is no prompt post deprivation hearing.

C. The other cases cited do not rebut Plaintiff's position

Defendants quote the discussion of selected cases in the *Ames* opinion. The cases referred to are *Blackhawk v. Andrus* 711 F.2d 753 (6th Cir. 1983), *Winzeler v. Busch* 694 F.Supp. 362 (N.D. Ohio 1988), and *Fry Bros. v. HUD* 614 F.2d 732 (10th Cir. 1980). The aforesaid cases do not rebut Plaintiff's position.

Blackhawk involved penalties for violations of the mining act. Under the procedure, a notice of violation and proposed penalty is sent in writing. The party may submit any evidence it deems relevant. Thereafter, a conference as to the alleged violation is held with an official who had no previous involvement with the case. Based on the conference a penalty may be assessed, and withholding allowed. A full hearing before an administrative law judge must [sic] provided within thirty days thereafter. However, in this case there is no procedure for a pre-deprivation conference, or for a prompt post-deprivation hearing. Thus *Blackhawk* is not applicable to this case.

The court in *Winzeler* held that withholding due to prevailing wage violations did not invoke due process rights because the deprivation was "temporary." The analysis was incorrect. A temporary deprivation does invoke due process rights to hearing. *U.S. v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993). The holding in *Winzeler* was rejected in *Ames* and *Bailey*. Moreover, it is inconsistent with the Supreme Court holding in *Daniel*.

Fry concerned a challenge to the amount set as the standard prevailing wage for certain workers for federal

projects. The court granted a motion to dismiss on the grounds that the wage determination is not reviewable under federal law, except as to procedural irregularities in determining the wage standard. The court stated that the complaint did not allege any facts sufficient to raise any such due process issue. *Fry* is not applicable to this case. *Fry* did not address any of the due process issues raised herein.

The requirements of due process, as set forth by the Supreme Court, clearly establish that the procedure in the Cal. Labor Code is unconstitutional. The authorities cited by Defendant do not establish otherwise.

VI. PLAINTIFF HAS STANDING

Defendants' contention that Plaintiff does not have standing has no merit. Plaintiff is a contractor who has performed work on public work projects as both a prime and subcontractor, and intends to continue to do so. Plaintiff has been subjected to repeated notices to withhold (which Plaintiff contends are meritless). Presently, over $100,000 is being withheld from Plaintiff on account of notices to withhold issued by Defendants. Plaintiff has standing to raise. the issues herein.

Plaintiff addressed the issue of standing, including the contention that Plaintiff's injury is indirect, in Plaintiff's Opposition to Defendants' Motion to Dismiss, parts V. and VIII. Plaintiff incorporates by reference said argument as though set forth fully herein.

Plaintiff explained in the opposition to the Motion to Dismiss that whether Plaintiff has privity of contract with

the awarding bodies for a particular project is immaterial, since this is not a breach of contract suit. Moreover, it should be noted that the California prevailing wage laws are statutory, not contractual obligations.

A. California prevailing wage laws are statutory, not contractual obligations

In *Lusardi v.* [sic] *Construction v. Aubry* 1 Cal.4th 976; 4 Cal.Rptr.2d 837 (1992) the California Supreme Court held that California prevailing wage laws were statutory, not contractual obligations. In *Lusardi* a project was built pursuant to an agreement between a public entity and a private owner. The construction was considered a private project, with Lusardi being hired as the contractor by the private owner. The contract with Lusardi did not require payment of prevailing wages. Subsequently, DLSE asserted that the project was subject to the prevailing wage laws, and that Lusardi was liable for underpayment of wages. Lusardi asserted that since it's contract did not require payment of prevailing wages, it could not be liable. Lusardi argued that any action by DLSE must be against the awarding body. DLSE asserted that the prevailing wage laws were statutory, not contractual obligations. Thus, DLSE contended that it was immaterial whether the obligation to pay prevailing wages was in Lusardi's contract. The California Supreme Court agreed with DLSE, and held that the prevailing wage laws were statutory, not contractual obligations.

VII. PLAINTIFF IS NOT ESTOPPED TO RAISE THE ISSUE

The assertion by Defendants that Plaintiff is estopped to raise the issue is without merit. The argument is addressed in Plaintiff's Opposition to Defendants' Motion to Dismiss at part X, which is incorporated herein by reference.

Simply put, Plaintiff cannot be estopped from seeking prospective relief. Moreover, performing public works projects does not estop one from challenging unconstitutional enforcement procedures. Defendants argue that one must contract with the awarding body to have standing to sue, but by doing so one is estopped to sue. Obviously, this is not correct.

Mandating that certain provisions be included in contracts does not render unconstitutional statutes valid.

> "Where a statute peremptorily requires certain clauses to be inserted, however, as is the case here, such clauses are not binding if the statute is found unconstitutional. Thus, the constitutional issue in this instance is not extinguished by plaintiff's voluntary entry into a contractual arrangement."

Winzeler supra. 694 F.Supp. at 366.

The issue of estoppel in a similar case was addressed in *Salla v. County of Monroe* 64 A.D.2d 437, 409 N.Y.S.2d 903 (1978). In *Salla,* a contractor challenged the constitutionality of a statute requiring resident labor. The court held that the Plaintiff was not estopped by performing a contract containing the requirement. The court stated:

> "We do not deem Lisbon's acceptance of the construction contract to be a waiver of its constitutional rights because a public contract should not be conditioned on a waiver on constitutional rights. Nor do we believe that Lisbon's attempts to comply with the statute in order to avoid breaching the construction contract constitute a waiver of the right to challenge its constitutionality."

Id. at 906-907 [Citations omitted].

VIII. PLAINTIFF DOES NOT HAVE AN ADEQUATE REMEDY AT LAW

Defendants assertion that Plaintiff has an adequate remedy at law in incorrect. The unconstitutional action which is challenged is the seizure of money without a hearing, and then requiring the party to pursue a lawsuit to recover the money. Certainly, the right to sue for the money is not an adequate remedy.

Plaintiff suffers irreparable injury from the inability to fund its business operations, and the damage to reputation in the industry. *See,* Plaintiff's Statement of Uncontroverted Facts Nos. 29-31.

Where unconstitutional state action threatens a person with injury, there is no adequate remedy at law, and an injunction is appropriate. *Ex parte Young* 209 U.S. 123, 165 (1908).

IX. THERE IS NO ISSUE OF IMMUNITY

The assertion of immunity for the individual defendants is incorrect. State officials are not immune from

suits to enjoin unconstitutional conduct. *Ex parte Young* 209 U.S. 123 (1908). The cases cited by Defendants concern actions for money damages.

X. CONCLUSION

There is no dispute as to the material facts. The procedure for withholding money without a hearing is clearly unconstitutional. Plaintiff respectfully submits that the motion for summary judgment should be granted.

Defendants incorrectly assert that Plaintiff seeks a mandatory injunction. Plaintiff seeks a prohibitory injunction.

Plaintiff seeks a declaration that *Cal. Labor Code* 1727, 1730-1733, 1775, 1776(g) and 1813 are unconstitutional, as these are the statutes that provide for assessment and withholding of penalties and forfeitures without a hearing. Plaintiff seeks an injunction prohibiting Defendants from applying or enforcing the aforesaid statutes against Plaintiff, or on account of alleged violations by Plaintiff. Plaintiff also seeks a declaration that the Notices to Withhold issued on account of alleged violations by Plaintiff are unconstitutional, and of no force and effect.

Alternatively, Plaintiff seeks a declaration that Defendants' application of the aforesaid statutes in unconstitutional, that the Notices to Withhold as to Plaintiff are unconstitutional, and of no force and effect, and for an injunction prohibiting Defendants from applying or enforcing the aforesaid statutes against Plaintiff, or on account of alleged violations by Plaintiff.

Plaintiff does not seek to have the prevailing wage law declared invalid, or to prohibit Defendants from enforcing the law by lawful means.

DATED: October 30, 1995

LEVIN, STEIN, CHYTEN & SCHNEIDER

By: /s/ Stephen A. Seideman
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	CASE NO. 95-4839 R (BQRx) MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO OPPOSITION TO MOTION TO DISMISS Date: November 6, 1995 Time: 10 a.m. Courtroom: No. 8 (Filed Oct. 30, 1995)

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

I

THE DUE PROCESS CLAUSE DOES NOT GUARANTEE PLAINTIFF A PRE-DEPRIVATION HEARING

Plaintiff continues to employ a simplistic due process analysis in its opposition to the motion to dismiss, as though a pre-deprivation hearing must be afforded in all cases regardless of the particular facts. This is plainly not the law, as revealed in the discussions in the very cases upon which plaintiff relies.

For example, in *Fuentes v. Shevin*, 407 U.S. 67 (1972), which plaintiff cites in its opposition, the court pointed out that the most salient factor in the case by case analysis required is the importance of the government interest. A governmental seizure can be justified without a prior hearing where it is shown, *inter alia*, that it is "directly necessary to secure an important governmental or general public interest." 407 U.S. at 66-67.

The California courts have made it clear that the manifold purposes of this statutory scheme include the protection of employees from substandard earnings,

allowing union contractors to compete with nonunion contractors, the benefit to the state of superior efficiency arising from well-paid labor, and the need to compensate nonpublic employees with higher wages since they do not have the steady employment and fringe benefits that public employees enjoy. See *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal. App. 3d 434, 463; 127 Cal. Rptr. 799; *Lusardi v. Aubrey* (1992) 1 Cal. 4th 976, 4 Cal. Rptr. 837.

The Davis-Bacon Act (40 U.S.C. Section 276 (a), et sec.) also provides for withholding of funds from contractors where there are prevailing wages violations. Due process attacks on this practice have been unavailing. The Court in *Ames Construction Co. v. Dole,* 727 F. Supp. 502 (D. Minn. 1989) reviewed the cases which have examined this withholding under due process standards and found that they had uniformly upheld such deprivations as consistent with the Fifth Amendment (See discussion at pp. 13-19 of Opposition to Summary Judgment Motion). The reasoning of those cases is controlling here.

II

PLAINTIFF'S INJURIES, CONSISTING SOLELY OF INDIRECT ADVERSE CONSEQUENCES OF GOVERNMENTAL ACTION, ARE NOT ACTIONABLE

Plaintiff cites allegations in the First Amended Complaint that it has acted as a prime contractor in the past and intends to do so in the future as a means of getting around its dilemma under *O'Bannon v. Town Court Nursing Center,* 447 U.S. 773, 100 S. Ct. 2467 (1980), since in this case it acted only as a subcontractor

Plaintiff misses the point. The allegations of the First Amended Complaint involve only those situations where plaintiff acted as a subcontractor. The injuries plaintiff has alleged therein flow solely from its status as a subcontractor. The fact that plaintiff might in the future sustain some detriment as a prime contractor due to its indifference to California's prevailing wage laws is absolutely immaterial.

Under no objective examination of the facts in this case can plaintiff be found to have been more than indirectly impacted by the complained of conduct of defendants. This being the case, it finds itself in the same position as the plaintiffs in the *O'Bannon* case and in the cases which have relied on the principle of *O'Bannon.*

III

THE INDIVIDUAL DEFENDANTS ARE IMMUNE FROM SUIT

Without citing a single case that supports the proposition, plaintiff contends that the well-recognized principle of the immunity of public officials whose conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person must have known" (*Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727 (1982)) does not apply here because this [sic] not an action for damages.

While it is correct that many of the cases involve actions for damages, defendants are aware of no authority that the application of this well-settled principle of law is limited to such cases. To apply a contrary principle would be unwarranted inasmuch as the same purpose,

the protection of public officers who are simply performing their prescribed duties from suit, is present whether damages are sought or only injunctive or other relief is sought.

IV

PLAINTIFF LACKS STANDING TO PROSECUTE THIS ACTION

The basis for plaintiff's argument that it has standing is simply and solely that it has performed work as a prime contractor in the past and may perform work in that status in the future. (First Amended Complaint, paragraphs 14, 15.) But in the factual circumstances alleged in this action it acted only as a subcontractor.

The logical extension of this theory is that any entity which might perform work as a prime contractor in the future on public works projects has standing to attack the constitutionality of this statutory scheme. Such an argument turns the case and controversy criterion on its head.

It is well settled "that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as a result of that action . . . " *Ex Parte Levitt*, 302 U.S. 633, 634, 58 S. Ct. 1 (1937) "A hypothetical threat is not enough." *United Public Workers v. Mitchell*, 330 U.S. 75, 90, 67 S. Ct. 556 (147).

Plaintiff tries to take comfort in *Associated General Contractors v. Coalition for Economic Equity*, 950 F. 2d 1401 (1991), where the Ninth Circuit held that an association of

contractors had standing to sue to contest the validity of an ordinance affording preference to minority contractors.

In the *Associated General Contractors* case the Court held that the association met the three pronged test of *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 97 S. Ct. 2434 (1977), since the members of the association had standing to sue on their own inasmuch as they had "firm intentions to bid for San Francisco city contracts." 950 F. 2d at 1401. Plaintiff, in its status as a subcontractor, cannot bid on any contract with a government agency since by definition it deals solely with the general contractor. This case, therefore, in no way supports plaintiff's position.

CONCLUSION

Plaintiff has not standing to maintain this action. Even if it had standing, it could not recover for the indirect adverse consequences of governmental action. Finally, it has not shown that the withholding of monies from its general contractor constituted a deprivation of due process as to plaintiff.

DATED: October 29, 1995

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20, Defendants.	CIVIL NO. 95-4839 R JUDGMENT **The Honorable Manuel L. Real** (Filed Nov. 7, 1995)

This action came on for hearing before the Court, on November 6, 1995, Honorable Manuel L. Real, District Judge Presiding, on a motion for summary judgment, and the evidence presented having been fully considered, the issues having been duly heard and a decision having been duly rendered,

It is ordered and adjudged that Plaintiff is awarded declaratory and injunctive relief against Defendants VICTORIA BRADSHAW; LLOYD W. AUBRY, JR.; DANIEL DELLAROCCA; ROGER MILLER; ROSA FRAZIER; DIVISION OF LABOR STANDARDS ENFORCEMENT; and DEPARTMENT OF INDUSTRIAL RELATIONS ("Defendants") as follows:

DECLARATORY RELIEF

1. California Labor Code §§1727, 1730-1733, 1775, 1776(g) and 1813 violate the due process clause of the Fourteenth Amendment to the United States Constitution and, therefore, are invalid.

2. The practice of Defendants of issuing notices to awarding bodies requiring the withholding of monies from contractors due to alleged violations of California prevailing wage laws is unconstitutional under the due process clause of the Fourteenth Amendment to the United States Constitution, and any such notices issued as to alleged violations by Plaintiff are invalid and of no force and effect.

INJUNCTION

3. Defendants are enjoined from applying or enforcing California Labor Code §§1727, 1730-1733, 1775, 1776(g) and 1813 against Plaintiff or on account of alleged violations by Plaintiff of California prevailing wage laws (i. e., *Cal. Labor Code* §§1720-1861).

Plaintiff shall recover costs of suit.

DATED: NOV-7 1995, 1995

/s/ MANUEL L. REAL
THE HONORABLE
MANUEL L. REAL JUDGE
OF THE UNITED STATES
DISTRICT COURT,
CENTRAL DISTRICT

(Certificate Of Service Omitted In Printing)

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	) CIVIL NO. 95-4839 R) ORDER DENYING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT **The Honorable Manuel L. Real** DATE: 11-06-1995 TIME: 10:00 a.m. PLACE: Courtroom 8, U.S.D.C. 312 N. Spring St. Los Angeles, CA 90012 (Filed Nov. 7, 1995)

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

The motion of Defendants to dismiss Plaintiff's complaint came on regularly for hearing on November 6, 1995, at 10:00 a.m. in Courtroom 8 of the above entitled Court, the Honorable Manuel L. Real presiding. Having considered all papers and arguments:

IT IS HEREBY ORDERED that the motion is denied.

DATED: NOV-7 1995, 1995

/s/ MANUEL L. REAL
THE HONORABLE
MANUEL L. REAL JUDGE
OF THE UNITED STATES
DISTRICT COURT,
CENTRAL DISTRICT

(Certificate Of Service Omitted In Printing)

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC.,

Plaintiff,

vs.

VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official

CIVIL NO. 95-4839 R

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The Honorable Manuel L. Real

(Filed Nov. 7, 1995)

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

The motion of Plaintiff G & G FIRE SPRINKLERS, INC. for summary judgment came on regularly for hearing before this Court on November 6, 1995 and Stephen A. Seideman appeared as attorney for Plaintiff and Thomas Kerrigan appeared as attorney for Defendants VICTORIA BRADSHAW; LLOYD W. AUBRY, JR.; DANIEL DELLAROCCA; ROGER MILLER; ROSA FRAZIER; DIVISION OF LABOR STANDARDS ENFORCEMENT; and DEPARTMENT OF INDUSTRIAL RELATIONS.

After considering the moving and opposition papers, and all other matters presented to the Court, and for the reasons that California Labor Code §§1727, 1730-1733, 1775, 1776(g) and 1813, and Defendants' assessment of penalties and issuance of notices requiring withholding of payment due to alleged violations of California prevailing wage laws, violate the due process clause of the Fourteenth Amendment of the United States Constitution and cause irreparable injury and substantial threat of irreparable injury to Plaintiff for which there is no adequate remedy at law, the motion is granted.

Judgment shall be entered for declaratory relief as requested in the Plaintiff's motion and enjoining Defendants from applying or enforcing California Labor Code §§1727, 1730-1733, 1775, 1776(g) and 1813 against Plaintiff or on account of alleged violations by Plaintiff of California prevailing wage laws (i. e., *Cal. Labor Code* §§1720-1861).

DATED: NOV-7 1995, 1995

/s/ MANUEL L. REAL
THE HONORABLE
MANUEL L. REAL JUDGE
OF THE UNITED STATES
DISTRICT COURT,
CENTRAL DISTRICT

(Certificate Of Service Omitted In Printing)

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	) Case No. 95-4839 R (BQRx)) OBJECTIONS TO ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND JUDGMENT

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

Defendants herein object to the proposed Order Granting Motion for Summary Judgment and to the proposed Judgment, both of which were lodged with the Court and served on defendants on November 7, pursuant to Local Rule 14.6, as follows:

I. Objections to Order Granting Motion for Summary Judgment

a. P.2, lines 9 through 16, beginning with the words "and for the reasons that" and ending with the words " no adequate remedy at law."

b. P. 2, lines 18 through 21, beginning with the words "for declaratory relief as requested" and ending with the words "and 1813."

II. Objections to Judgment

a. P. 2, lines 7 through 9, beginning with the word "Victoria" and ending with the word "Frazier."

b. P. 2, line 13 through 15.

c. P. 2, lines 16 through 22.

d. P. 3, lines 2 through 6.

The foregoing objections are based on the legal grounds enumerated in the attached Memorandum of Points and Authorities filed in support thereof. Defendants request that the Court set these Objection for a hearing.

Dated: November 13, 1995

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California –

By: Thomas S. Kerrigan
Michael Villeneuve

/s/ Thomas S. Kerrigan
Thomas S. Kerrigan
Attorney for the Labor Commissioner

(Declaration Of Service Omitted In Printing)

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	) Case No. 95-4839 R (BQRx)) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OBJECTIONS TO JUDGMENT AND ORDER

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

I

INTRODUCTION

Plaintiff, a subcontractor on certain public works projects, attacked the constitutionality of the practice of the State of California in issuing Notices to Withhold to the awarding bodies on account of the failure of plaintiff to pay prevailing wages to its employees without first giving either the prime contractor or plaintiff a formal hearing. As plaintiff alleges in its First Amended Complaint, "Prior to issuing the Notices mentioned in Paragraph 16, above, Defendants did not provide Plaintiff, or the Prime Contractors who employed Plaintiff with any hearing with respect to the allegations or potential forfeitures or penalties, or with respect to the reasons for them, or with respect to the total of the alleged amounts due." (Para. 17, p. 6).

Plaintiff argues, likewise, in its Motion for Summary Judgment that defendants have violated its constitutional rights by not granting a hearing prior to issuing the Notices to Withhold. The Court granted the motion for summary judgment on that basis.

The proposed orders submitted by plaintiff, however, go well beyond seeking to prohibit this practice of issuing these notices without a hearing. The proposed injunction would foreclose the State of California "from applying or enforcing California Labor Code Sections 1727, 1730-1733, 1775, 1776 (g) and 1813 against Plaintiff or on account of alleged violations by Plaintiff of California prevailing wage laws (i.e., Cal. Labor Code Sections 1720-1861)." The proposed order granting summary judgment and the proposed judgment itself would declare each of these sections unconstitutional and unenforceable, regardless of whether or not hearings are afforded in the future and despite the fact, as conceded by plaintiff, that these statutes are directly applicable only to the prime contractors with which plaintiff contracted.

Since the alleged vice of defendants is not in enforcing the statutory scheme, but in failing to give plaintiff or its prime contractor a hearing prior to issuing the Notices to Withhold, the relief is vastly overbroad. The proposed order and judgment would have the effect of exempting plaintiff from compliance with the law, according it a special status not enjoyed by any other contractor, to the detriment of the interests of its workers and the general public. Moreover, defendants contend that the submission of the proposed order and judgment, which in effect would authorize plaintiff to operate its business outside the law, is nothing less than an instance of plaintiff consciously overreaching in an effort to secure an improper competitive advantage.

Local Rule 14.6 provides that opposing counsel may file and serve objections to a proposed order or judgment within five court days of service of the proposed order or

judgment. The proposed order and proposed judgment in this case was served by plaintiff on November 7, 1995. On November 13, 1995, a day before the time for making such objections expired, defendant's counsel was surprised to receive in the mail from the Clerk of the Court a copy of the order and judgment signed by the Court on November 7, 1995.

II

THE PROPOSED ORDERS ARE FATALLY OVERBROAD AND SHOULD NOT ISSUE

Seeking to capitalize on the Court's announced decision to grant its motion for summary judgment, plaintiff has submitted proposed orders which, if entered, would invalidate the statutory scheme with respect to its operations, going well beyond any relief to which plaintiff is entitled.

It is a well-settled principle of federal law that injunctive relief is a drastic remedy and therefore any injunction must be narrowly tailored to give only the relief to which a plaintiff is clearly entitled. *Califano v. Yamasaki* (1979) 442 U.S. 682, 702, 99 S. Ct. 2545; *Orantes-Hernandez v. Thornburg.*, 919 F.2d 549, 558 (9th Cir. 1990).

Here, it is not the provisions of the Labor Code enumerated in the proposed order and judgment that plaintiff has any legitimate complaint about, it is only the enforcement policy and practice, not specified in these statutes, that has denied plaintiff a hearing prior to the issuance of the Notices of Withholding. Assuming, *arguendo*, the correctness of plaintiff's position, the most plaintiff should be entitled to, if injunctive relief is to

issue at all, is an injunction against withholding of funds without first granting a hearing to interested parties. Plaintiff cannot use an alleged infirmity in agency policy as an opportunity for a wholesale scrapping of a long standing statutory scheme designed for the public welfare.

The substance of the provisions being attacked may be briefly summarized. Labor Code Section 1727 merely provides for the withholding of payments to prime contractors after an investigation where such payments have been "forfeited" within the meaning of the law. This section, on its face, does not prohibit the holding of hearings prior to withholding. Sections 1730-1733 merely provide for suits by contractors to recover wages. The invalidation of these sections is not necessary to protect plaintiff interests. Section 1775, interestingly enough, provides for a right of action on behalf of the State to collect penalties for violations by a contractor. This is obviously consistent with due process and cannot rationally be enjoined. Section 1776(g) provides for penalties for payroll record violations and withholding of the sums penalized. Again there is nothing in this section that prohibits the State from granting a hearing prior to withholding. Section 1813 provides only for the enforcement of overtime provisions of California law without any specification within the section itself for withholding. To summarize, nothing in these provisions provide for deprivation without a hearing.

Not only is the proposed order and injunction overbroad, it is also inimical to the public interest since it excuses plaintiff from compliance with longstanding minimum labor standards. Traditional equitable grounds for

the issuance of an injunction include analysis of the impact of the requested relief on the public interest. *U.S. v. Odessa Union Warehouse Co-Op*, 833 F.2d 172, 176 (9th Cir. 1987); *American Motorcycle Association v. Watt*, 744 F.2d 962, 966.

Plaintiff cannot be relieved of the duty owed by all other public works contractors to comply with the established minimum labor standards of this State. To permit it to do so by issuing this proposed order and injunction merely because of a past policy of not having pre-deprivation hearings which this Court finds necessary would constitute a miscarriage of justice.

III

THIS IS NOT A PROPER CASE FOR INJUNCTIVE RELIEF

The proposed order calls for an injunction against each of the defendants. There are legally sound reasons for denying this kind of drastic relief. These reasons include, *inter alia*, the lack of irreparable injury since a sum certain is all that is in question, the dubious nature of plaintiff's claim, the lack of standing of plaintiff based on lack of privity of contract, and the immunity of the individual defendants from suit.

"When a district court imposes a preliminary injunction on a state agency, a strong factual record is necessary; our review of the injunction must be more rigorous than when we review an injunction against a state as opposed to a federal agency, since the Supreme court requires a showing of an intentional and pervasive pattern of misconduct in order to enjoin a state agency."

Thomas v. City of Los Angeles, 978 F.2d 504, 508 (9th Cir. 1992).

Plaintiff has allegedly lost payments of $135,000.00 withheld from the prime contractor and allegedly deducted by the prime contractor from payments due plaintiff. (First Amended Complaint, p. 6).

Since plaintiff cannot satisfy its burden to show that it does not have an adequate remedy at law, no injunction should issue. *Stanley v. University of Southern California*, 13 F 3d 1313 (9th Cir. 1994); *Caribbean Marine v. Baldridge*, 844 F.2d 668 (9th Cir. 1988)

Defendants have maintained throughout this case that plaintiff does not possess a tenable due process claim. As has already been pointed out, there is abundant authority for the proposition that claims under public contracts do not rise to the stature of due process deprivations.

In *S.D. Maintenance v. Goldin*, 844 F.2d 962 2nd Cir. 1988) the plaintiff sued the City of New York for withholding payments during an audit period, claiming the withholding constituted a violation of due process. Denying the claim, the court found no due process entitlement:

"Other courts of appeals have also been reluctant to surround the entire body of public contracts rights with due process protections. See, e.g., *San Bernardino Physicians Services Medical Group, Inc. v. County of San Bernardino*, 825 F. 2d 1404 (9th Cir. 1987) (denying due process protection for contractual right to supply medical services for four-year term); *Brown v. Brienen, supra* (expressing doubt that

due process protection extends to contractual right to compensatory time off); *Casey v. Petrillo*, 697 F. 2d 22, 23 (1st Cir. 1983) (per curiam); *Manning v. Lockhart*, 623 F. 2d 536, 538 (8th Cir. 1980) (per curiam)" 844 F. 2d at 967.

As pointed out by the Ninth Circuit in the *San Bernardino Physicians Services* Case, "[i]t is neither workable nor within the intent of 1983 to convert every breach of contract claim against a state into a federal claim." The court added that "the farther the purely contractual claim is from an interest as central to the individual as employment, the more difficult it is to extend it constitutional protection without subsuming the entire state law of public contract". 825 F. 2d 1404, 1408-1410 (9th Cir. 1987).

In *Reich v. Beharry*, 883 F.2d 239 (3d Cir. 1989) the court expressed similar concerns:

"So far as we are able to determine, every court of appeals that has directly confronted the issue has concluded that although state contract law can give rise to a property interest protectible by procedural due process, not every interest held by virtue of a contract implicates such process. Many . . . courts have observed that if every breach of contract by someone acting under color of state law constituted a deprivation of property for procedural due process purposes, the federal courts would be called upon to pass judgment on the procedural fairness of the processing of a myriad of contractual claims against public entities. We agree that such a wholesale federalization of state public contract law seems far afield from the great purposes of the due process clause." 833 F 2d. at 242 (citations omitted).

It is well settled that a qualified immunity shields public officials where conduct "does not violate clearly

establishes statutory or constitutional rights of which a reasonable person must have known." *Harrlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982); *Anderson v. Creighton*, 483 U.S. 635, 6390640, 107 S. Ct. 3034 (1987); *Erickson v. U.S.*, 976 F. 2d 1299, 1301 (9th Cir. 1992).

Plaintiff's declarations make no showing concerning the knowledge or lack of knowledge of the individual defendants concerning the validity of these statutes. Having failed to so show, it cannot be heard to request injunctive relief against them.

Plaintiff accordingly cannot be heard to urge this Court to issue wide-ranging injunctive relief in a situation where its due process claim is at best questionable.

CONCLUSIONS

For the reasons stated herein, defendants request that its objections to the proposed order and proposed judgment be sustained and that no injustice relief issue against defendants.

DATED: November 13, 1995

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California

By: Thomas S. Kerrigan
Michael Villeneuve

/s/ Thomas S. Kerrigan
Thomas S. Kerrigan
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20, Defendants.	) Case No. CV 95-4839 R(BQRx)) NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT) (Filed November 16, 1995)

Defendants herein, Victoria Bradshaw, Lloyd W. Aubry, Jr., Daniel Dellarocca, Roger Miller, Rosa Frazier, Division of Labor Standards Enforcement, and Department of Industrial Relations, appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment of the district court, filed in this case on November 7, 1995, and all previously and simultaneously entered interlocutory orders and decisions of the court.

DATED: November 15, 1995

Thomas S. Kerrigan
Michael Villeneuve
DIVISION OF LABOR
STANDARDS ENFORCEMENT
Department of Industrial
Relations State of California

By: /s/ Thomas S. Kerrigan
Thomas S. Kerrigan
Attorney for Defendants

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	) CIVIL NO. 95-4839 R) PLAINTIFF'S RESPONSE TO DEFENDANTS' OBJECTION TO ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND JUDGMENT **The Honorable Manuel L. Real**

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

Defendants' objections to the order granting motion for summary judgment and judgment are without merit. Defendants' counsel has stated that Defendants intend to make a motion to modify the judgment. Plaintiff assumes that no specific response is necessary unless, and until, Defendants make such a motion. If it would be appropriate, or necessary, for Plaintiff to submit a specific response to the objections served by Defendants, Plaintiff requests that it be provided with an opportunity to do so. Otherwise, it is Plaintiff's understanding that the issue would be addressed by the Court only upon the filing of an appropriate motion by Defendants.

DATED: November 1995

LEVIN, STEIN, CHYTEN
& SCHNEIDER

By: /s/ [Illegible]
Stephen A. Seideman, Esq.
Attorneys for Plaintiff
G & G FIRE SPRINKLERS, INC.

(Certificate Of Service Omitted In Printing)

JAN 16 2001

No. 00-152

Supreme Court, U.S.
FILED
JAN 16 2001

In The

Supreme Court of the United States

ARTHUR S. LUJAN, an individual, in his official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California,

Petitioners,

v.

G & G FIRE SPRINKLERS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

1. Is a statutory seizure of money due under a contract, by State Enforcement officials, for payment of civil penalties and third-party wage claims, which have been assessed for alleged violations of the Labor Code, to advance the regulatory policy of the State, a deprivation of property?

2. If the money seized must be held until the completion of a civil lawsuit, including exhaustion of appellate rights, does the Due Process Clause require a pre- or prompt post-deprivation hearing?

3. If the seizure becomes permanent, with no hearing being held, by the failure of the contractor to file a lawsuit within ninety days of completion of the project, must there be a pre- or prompt post-deprivation hearing?

4. Is a targeted subcontractor, who is alleged to be the violator of the Labor Code, and who bears the economic burden of the seizure, entitled to a hearing at any time, and if so, is the subcontractor entitled to a pre- or prompt post-deprivation hearing?

5. Does the California Procedure deprive a contractor and/or a subcontractor of a property interest in a claim to payment?

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I. INTRODUCTION

Consider a procedure that allows enforcement officials to seize money, without notice or hearing, based on secret one-sided determinations. Consider further a contractor who pays the prevailing wage being choked to death because of its non-union status. You have just considered a procedure that was declared to be unconstitutional by the District Court and Court of Appeals.

Petitioner's brief revealed, for the first time to G&G, that in response to this lawsuit, the State has adopted legislative changes scheduled to become effective July, 2001. Notwithstanding the legislative changes, the judgment in this case remains vital, and should not be vacated.

II. DESIGNATION OF THE PARTIES

The respondent is G & G Fire Sprinklers, Inc. ("G&G") a contractor.

Petitioners are referred to as "DLSE." DLSE is the state agency mandated to enforce the California Labor Code. *Labor Code* §90.5.[1] The Labor Commissioner is chief of DLSE. *Labor Code* §21. The office of the Labor Commissioner, and DLSE, are the same entity. Jt. App. 230.[2]

III. STATEMENT OF FACTS

A. Application Of The Notice To Withhold Procedure To G&G

G&G is a fire sprinkler contractor whose business includes performing work on public works projects in California. Jt. App. 189-190. G&G became a target of DLSE enforcement officials. Jt. App. 189-222. G&G

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[1] All references to the "Labor Code" refer to California Labor Code.

[2] "Jt. App." refers to the Joint Appendix.

believed that it was being targeted by DLSE, because of its non-union status. Jt. App. 151. G&G believed that DLSE was participating in an effort to force G&G out of business. *Id.*

G&G has performed work as a prime contractor, and as a subcontractor, on public works projects. Jt. App. 189-190. DLSE issued Notices to Withhold against G&G on numerous projects. Jt. App. 190-191. G&G disputed and denied the allegations of DLSE, and contended there was no proper basis for the Notices to Withhold. Jt. App. 191, 193. G&G asserted that the Notices to Withhold were "wrongful, incorrect, and excessive, and were issued arbitrarily and unreasonably." Jt. App. 69.

Prior to the seizures which were pending when this action was filed, DLSE seized money on a number of G&G's projects, including projects known as Anaheim City Public Utilities Project; Moore Hall Seismic Renovation, at University of California, Los Angeles; University Center Expansion, at University of California, Santa Barbara; Rec-Center, University of California, Santa Barbara; and the Pyramid at California State University, Long Beach. Jt. App. 190-191. G&G acted as both a prime contractor, and subcontractor, depending on the project. Jt. App. 190-191. The aforesaid Notices to Withhold seized approximately $300,000 of money due. Jt. App. 159, 190-191. G&G contended that the penalties and wage claims asserted by DLSE were arbitrary, unreasonable and without merit. Jt. App. 69, 191. The exclusive remedy, upon seizure of the money, is to file a lawsuit, and all money must be held pending completion of the lawsuit, including appeal. In the meantime, the seizure of the money was cutting off G&G's cash flow, putting G&G at imminent threat of going out of business. Jt. App. at 193-194. G&G filed an action in the United States District

Court, alleging that the seizure procedure was unconstitutional. Jt. App. 152-153, 174-175. Meanwhile, a state court ordered G&G and DLSE to mediation. A settlement was reached. DLSE released all of the Notices to Withhold (Southern California only) in exchange for approximately ten percent of the money seized. Jt. App. 174-175; Notice of Settlement filed in District Court is lodged by G&G.

Not long after the events described above, DLSE issued a Notice of Penalty Assessment against G&G on a project known as CSU, San Bernardino. Jt. App. at 195-196. The Notice of Penalty Assessment was dated July 12, 1995. The Notice of Penalty Assessment ordered the University (project owner) to withhold $750 per day, commencing July 1, 1995, "from any and all progress payments which now or thereafter may become due to the contractor." Jt. App. 195-196. The notice stated that "the withholding shall continue until you are notified to the contrary by this office." *Id.* The Notice to Withhold identified G&G as the targeted subcontractor. The Notice was issued just as G&G was to receive the final payment on the project. Jt. App. at 193. The Notice of Penalty Assessment was open-ended, increasing on a daily basis. The University was unable to release any money to the prime contractor on the project. Jt. App. 259, 260. As a result, over $500,000 due to the prime contractor was being held by the seizure. Jt. App. at 259, 260.

The notice asserted that penalties had been assessed pursuant to §1778(f) of the Labor Code. Jt. App. 195. There is no such statute. A subsequent notice stated that the penalties were assessed under *Labor Code* §1776(g). Jt. App. 208-209. The statute provides for civil penalties, to be assessed by DLSE, when a contractor fails to comply with a request for payroll records within ten days. Neither G&G nor the prime contractor received any request

for payroll records, prior to receipt of the Notice to Withhold. Jt. App. 192, 259-260. The deputy labor commissioner, who issued the notice, contended that such a request had been sent to G&G (albeit at an out-dated address). Jt. App. at 192. G&G promptly provided the payroll records, and requested that the penalty assessment be rescinded. Jt. App. 192-193. DLSE refused to rescind the penalty assessment. Jt. App. at 192-193.

Upon G&G's receipt of the Notice of Penalty Assessment for CSU, and DLSE's refusal to rescind the penalty assessment, it was apparent to G&G that DLSE would issue a Notice to Withhold against G&G, on any project, irrespective of whether there was any basis to do so. The District Court lawsuit was re-filed.

A month later, the open-ended penalty assessment remained in effect, and no money could be released by the owner of the project. As a result, G&G's agreed-upon payment was not received. Jt. App. 193. G&G's attorney sent a letter to DLSE demanding that the Notice of Penalty Assessment be rescinded immediately. Jt. App. at 253-256. G&G's attorney further stated that, in the event DLSE was unwilling to rescind the Notice of Penalty Assessment, a specific amount thereof should be specified.

On September 13, 1995, DLSE's counsel transmitted a Notice to Withhold to the University (the awarding body), superceding the previous penalty assessment. Jt. App. at 197-209. The letter from DLSE's counsel to the University stated: "Transmitted herewith is a copy of DLSE's Notice to Withhold with respect to subcontractor G & G Fire Sprinklers, Inc. This Notice to Withhold supercedes the previous Notice of Penalty Assessment." Jt. App. 198. The Notice to Withhold was in the amount of $23,121.28. Jt. App. 199. The notice alleged wage underpayments of $1,771.28, and penalties of $21,350. Jt. App.

208-209. The penalties included $20,000 for failure to provide payroll records under *Labor Code* §1776(g). *Id.* The penalties were assessed at the rate of $750 per day. The statute provides for a penalty of $25 per day, per worker. Basic arithmetic reveals that penalties were based on thirty workers per day. There were four workers. Jt. App. 199-205. The Notice to Withhold stated that the University was "directed to withhold and retain from any payment due the general contractor the total amount of $23,121.28." Jt. App. at 199. DLSE also included a standard memorandum explaining that the contractor was not allowed to post a bond in lieu of the seizure of funds. Jt. App. at 201-202. The memorandum explained that the purpose of the seizure is to create a fund that may be transmitted as payment to DLSE, and therefore a bond was not allowed. *Id.* The seizure of the prime contractor's money was passed through, by the prime contractor, to G&G. As a result, G&G's agreed-upon money due for the project was not paid. Jt. App. at 193.

On September 22, 1995, DLSE issued a Notice to Withhold on a project known as City Hall-Culver City. Jt. App. 210-218. The Notice to Withhold asserted alleged violations of the Labor Code by G&G. The notice stated that the city was "directed to withhold and retain from any payments due the general contractor the total amount of $48,314.64, which is the sum of all wages and penalties forfeited pursuant to the provisions of *Labor Code* §1727 as evidenced by the attached Notice of Wages Owed and Notice of Penalty Assessment." Jt. App. at 210-211. The attached Notice of Wages Owed stated: "Please take notice that the persons named on Exhibit A, attached hereto and made a part hereof, have performed labor as stated on Exhibit A." The Exhibit A identified G&G as the alleged violator, but merely referenced "unknown employees." Jt. App. at 216. DLSE gave no

prior notice that the Notice to Withhold and Penalty Assessment would be issued. Jt. App. at 193. G&G requested information as to the basis of the notice, but none was provided. *Id.* G&G disputed that there was any basis for the Notice to Withhold. *Id.*

A Notice to Withhold was also pending on a project known as San Joaquin General Hospital. Jt. App. 192. DLSE told G&G that it disputed the job classification used by G&G for certain workers on the project. Jt. App. 192.

Each of the aforesaid Notices to Withhold was issued on account of alleged violations of the California Prevailing Wage Law by G&G. Jt. App. 190-191. Pursuant to the mandate of the Notices to Withhold, the awarding bodies for each of the projects withheld payments they had determined to be due to the prime contractors, and the prime contractors, in turn, withheld money earned by G&G. Jt. App. 191. As a result of the Notices to Withhold that were pending, more than $120,000 was being withheld from G&G. Jt. App. 193. This was the status when the motion for summary judgment in this case was heard, and granted.

B. The Notice To Withhold Procedure

The prevailing wage laws apply to public projects, and private projects funded, in whole or in part, by public money. *Labor Code* §1720. The prevailing wage laws impose, upon contractors and subcontractors, obligations with regard to payment of wages, work hours, and record keeping relating thereto. *Labor Code* §§1774, 1776, 1813. The prevailing wage obligations are imposed as a matter of law, irrespective of the terms of any contract. *Lusardi v. Aubry*, 1 Cal.4th 976; 4 Cal.Rptr.2d 837 (1992).

The Labor Code provides various enforcement mechanisms for violations of the prevailing wage laws. A

violation of the prevailing wage laws may give rise to criminal penalties (§§1777, 1778), administrative debarment (§1777.1), civil penalties (§§1775, 1776(g), 1813), and liability for wage underpayments (§1775). The Labor Code provides for the payment of civil penalties, and wage claims, from money that becomes due under the public works contract. *Labor Code* §§1727, 1730-1731, 1775.

The Notice to Withhold is a procedure used by DLSE to enforce the prevailing wage provisions of the Labor Code.[3] The Notice to Withhold is a statutory seizure order issued by DLSE to an awarding body. *Labor Code* §1727, *Id.* The seizure is made without notice or hearing. *Id.* The Notice to Withhold seizes payments as they become due under the contract. *Id.* The Notice to Withhold sets forth civil penalties assessed by DLSE, and alleged wage claims asserted by DLSE. *Id.* The Notice to Withhold identifies the subcontractor, if any, alleged to have violated the Labor Code. *Id.* The awarding body is ordered to remit the money seized to DLSE, unless the contractor files a lawsuit, pursuant to *Labor Code* §§1730-1731. *Id.* If a lawsuit is filed, the money is held by the awarding body, as a stakeholder, pending completion of the lawsuit, including exhaustion of all appellate rights. *Id.* The lawsuit is the exclusive remedy, and no other issue may be included in the action. *Id.* The money must be held pending conclusion of the lawsuit, including exhaustion of all appellate rights. *Labor Code* §1731; *Krueger v. San Francisco*, 198 Cal.App.3d 1, 243 Cal.Rptr. 585 (1988); Jt. App. 182, 332-335 [undisputed fact on summary judgment]; *See also, Purdy v. State of California*, 71 Cal.2d 566 (1969) [action pursuant to *Labor Code*

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[3] *Krueger v. San Francisco*, 198 Cal.App.3d 1, 243 Cal.Rptr. 585 (1988); *Labor Code* §§1727, 1730-1733, 1775, 1813; Jt. App. 195-222; Jt. App. 241, 250; Jt. App. 333-335.

§§1730-1731 is the exclusive remedy to recover money seized]. The awarding body has a mandatory duty under the Labor Code to comply with the Notice to Withhold. *Id.* A refusal to comply with the Notice to Withhold can be a crime. *Labor Code* §1777.

The Labor Code provides that the contract should give notice of the obligation to pay prevailing wage, and the potential for civil penalties. *Labor Code* §§1773.2, 1773.8, 1775, 1813. The authority for the Notice to Withhold is *Labor Code* §1727. *See also,* Jt. App. 195-222 [Notices to Withhold and DLSE memorandum]. The Labor Code does not provide that the withholding requirement be included in the contract. *See, Labor Code* §1727.

IV. THE PROCEEDINGS BELOW

G&G filed this action in District Court alleging that the Notice to Withhold Procedure, and statutes on which it was based, were unconstitutional. Jt. App. 151-152.

G&G obtained summary judgment. The only fact disputed by DLSE was G&G's contention as to the amount of time necessary to litigate the State Court lawsuit. Jt. App. 332-335. DLSE stated that a State Court lawsuit could be brought to trial nine to fifteen months after filing. DLSE did not dispute that the money must be held pending trial, and appeal. *Id.*, 181-182, 332-335. G&G argued that the procedure was unconstitutional, even accepting DLSE's contention regarding the time required to bring a case to trial. Jt. App. 352. G&G contended that due process required a hearing, with regard to the "temporary" seizure, pending the completion of the lawsuit provided for by the Labor Code.

The District Court found in favor of G&G.

The Court of Appeals affirmed the District Court's judgment, with a modification. *G & G Fire Sprinklers, Inc.*

v. Bradshaw, 156 F.3d 893 (9th Cir. 1998). The Court of Appeals held that the Notice to Withhold Procedure was unconstitutional, but that the statutes need not be declared unconstitutional on their face. *Id.* at 905. The Court held that the statutes were unconstitutional as applied. *Id.* The Court of Appeals stated that the constitutional defect could be remedied by adoption of regulations providing for a pre-deprivation or prompt post-deprivation hearing. *Id.* The Court of Appeals held that the right to a lawsuit under *Labor Code* §§1730-1733 did not satisfy the due process violation asserted by G&G. *Id.* at 904, n.9.

Upon a Petition for Rehearing by DLSE, the Court of Appeals modified the opinion to state that a post-deprivation hearing would be sufficient (as opposed to requiring a pre-deprivation hearing). Pet. App. A-18.

The case was remanded to the District Court. In response to the Ninth Circuit's opinion, DLSE adopted regulations providing that a prime contractor, or subcontractor, could obtain a hearing, within thirty days. The hearing would determine whether there was "reasonable cause" for the Notice to Withhold. The regulations provided that the hearing would have no *res judicata* effect with regard to an underlying State Court lawsuit, filed pursuant to *Labor Code* §§1730-1733. *See, Title 8 of California Code of Regulation* §§16410-16414. DLSE argued to the District Court that the regulations remedied the constitutional violation in accordance with the Ninth Circuit opinion.

Subsequently, this Court granted a Petition for Writ of Certiorari, and vacated the Ninth Circuit opinion for reconsideration in light of *American Manufacturer's Mutual Insurance Co. v. Sullivan,* 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999). The Ninth Circuit issued an order

reinstating its prior opinion, without modification. *G & G Fire Sprinklers v. Bradshaw*, 204 F.3d 941 (9th Cir. 2000).

V. THE COURT OF APPEALS OPINION

The Court of Appeals held that the Notice to Withhold Procedure is a "seizure" which requires the State "provide the contractor with a reasonably prompt hearing of some sort." *G&G, supra*, 156 F.3d at 897, 904. The Court relied on *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969), in holding there was a deprivation of property, comparing the procedure to a garnishment. *Id.* at 901. The Court explained that the Labor Code authorized seizure of "*money owed* to contractors or subcontractors for alleged violations of the state prevailing wage law." *Id.* at 902. [Emphasis Added.] If a lawsuit is filed to recover the money seized, "the money is held in escrow until its resolution. §1731." *Id.* at 898.

The Court held that a prompt post-deprivation was due, relying on *Gilbert v. Homar*, 520 U.S. 924, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997) [temporary suspension of pay required "prompt post suspension hearing."]. The Court held that a right to a lawsuit under *Labor Code* §§1730-1733 was not sufficient due process, rejecting DLSE's reliance on *Parrat v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

The Court held that the injury to G&G, as a subcontractor, was a direct injury; but even if it was indirect, the result would be the same – G&G had standing to assert "a direct constitutional challenge" to DLSE's conduct. *Id.* at 899-901, 902. "The state's action is targeted at G&G; the prime contractors' only role in the dispute is that of a conduit." *Id.* at 900.

The Court rejected DLSE's argument that this case involved contractual disputes. *Id.* at 902. The Court explained that the case posed no risk of "federalization"

of state contract law. *Id.* at 902. The case involved the "regulatory power" of the State. *Id.* at 902.

The Court rejected DLSE's contention that G&G's lack of a direct right of action against the awarding body was a basis for denying relief. *Id.* at 901. In response, the Court stated that the inability of a subcontractor to sue for recovery of the money seized "only bolsters" their conclusion in the case. *Id.* at 901. The Court noted the self-executing nature of the procedure. *Id.* at 904. [If a lawsuit is not filed within ninety days, the seizure is permanent, without any hearing having been held].

The Court held the statutes were unconstitutional as applied. The constitutional defect could be remedied by adopting a hearing procedure for "G&G and others." *Id.* at 905-906. The Court did not specify a particular procedure, but left the State "to manage its own affairs in a manner consistent with the Constitution." *Id.* at 905.

In connection with holding that the case does not involve breach of contract claims, the Court stated that "G&G concedes that the express terms of the contract grant the state authority to withhold funds for wage violations; the withholding is not a breach of contract." *Id.* at 902. A review of G&G's briefs will reveal that no such statement was made. G&G has consistently argued that DLSE's action is not pursuant to contract. The Court explains, in a footnote, that it is referring to G&G's point that usual breach of contract remedies do not exist for the statutory seizure. *Id.* at 902, n.6. G&G's point was that the awarding body is under a statutory mandate to withhold the payment due, hence there is no breach of contract; and the exclusive remedy is the lawsuit under *Labor Code* §§1731-1733. *See*, Appellee's Brief filed in Ninth Circuit, March 25, 1996, p. 13.

Upon remand from this Court, to reconsider the opinion in light of *Sullivan*, the Court of Appeals reinstated its opinion, without modification. *G&G v. Bradshaw*, 204 F.3d 941 (9th Cir. 2000). The Court of Appeals held that this case involved state action, and the Court distinguished *Sullivan* with regard to the property interest. The Court stated that there was a property interest in the right to a claim for payment. G&G believes that additional grounds for distinguishing *Sullivan* exist. In addition to relying on the reasoning of the Court of Appeals opinion, G&G sets forth in this brief the additional reasons that *Sullivan* is distinguishable from this case.

VI. SUMMARY OF ARGUMENT

This is a case about the deprivation of property. The property seized, while it goes by various names, is what we have called in this litigation, the right to money due for work performed. The right to money due means the right to *money due*. The money seized by DLSE is money due. There are certain sequences of events which must occur in a particular order, to occur at all. Among these is that payment under a contract must be due before payment is made. In a California public works project, money is determined to be due when the awarding body, in the exercise of its *proprietary* judgment, determines that money is due and payable under the public works contract.

An awarding body, exercising it's *proprietary* judgment, may determine that money requested, is not due. A dispute can arise. The dispute may be submitted to a dispute resolution procedure. While there are particular procedures of this sort in California, for public works contract disputes, they are of no specific concern here. The significant point is that upon resolution of the dispute, whether by agreement, arbitration award, judgment

or otherwise, if the resolution calls for payment to the contractor, money is due for work performed.

If every payment for work performed was disputed, little work would be done. The usual state of affairs is that money becomes due, when the awarding body, acting under the terms of its contract, and within the broad confines of the California Public Contracts Code, makes the proprietary determination that money is due. The consequence of a determination that money is due, is that money is paid; all of which occurs, before any effective action is taken by DLSE.

DLSE enters as a stranger to the contract. DLSE, at times, refers vaguely in its brief to itself, and the awarding body, interchangeably, as the "State." The two are not the same, in substance or form. DLSE attempts to clothe itself in the sheep's wool of the awarding body's proprietary conduct. DLSE itself has declared, in another case, that it "is the enforcing entity of the prevailing wage statutes and . . . is not a participant in the various public works projects."[4] The California Supreme Court has declared that DLSE's enforcement actions creates a "direct and palpable conflict of interest" with the proprietary concerns of the awarding body. The conclusion that DLSE is engaged in enforcement activity, pursuant to the regulatory power of the State, and not proprietary marketplace activity, is not even a close call. In a similar vein, the conclusion that DLSE's actions are not contractual, but wholly regulatory, is not a close call either. Once again, the California Supreme Court has spoken on the issue. The Court stated that the prevailing wage obligations are statutory obligations, imposed by law, even if the contract says in big, bold, red, underlined letters that

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[4] *Department of Industrial Relations v. Fidelity Roof*, 60 Cal.App.4th 411, 420; 70 Cal.Rptr.2d 465 (1997).

"Thou shall not pay the prevailing wage." The California Supreme Court held that DLSE is not in privity with the awarding body. The California Public Contracts Code provides that each public agency in California has its own right to act as an independent marketplace participant, with regard to public works. Labor Code § 1727, which provides DLSE with the authority to issue the so-called Notices to Withhold (which would be better termed notices of SEIZURE), does not require, or even suggest, that a public works contract set forth, or even provide notice of, the withholding procedure. All that the Labor Code directs be put in a public works contract, is notice of the contractor's legal obligation to comply with the prevailing wage laws, and possibly also (though the statutes are vague on this) notice of the potential for civil penalties and liability if the law is violated. The statute expressly states that the *"money due"* is *"forfeited"* by violations of the Labor Code. It is difficult to forfeit something one does not own. Admittedly, the mere use of isolated words in the statute is not dispositive, since substance controls over form. The substance here is a statutory forfeiture, implemented by a statutory seizure, pursuant to the order of government enforcement agents. The character of the action is confirmed by the fact that DLSE officials assert *prosectutorial* immunity for the issuance of Notices to Withhold. (A copy of such a ruling from *G&G v. Dept.* BC220974 is lodged herewith).

Having established that DLSE is a stranger to the contract, and more importantly, a stranger to the proprietary concerns of the contract, we still have yet to see DLSE enter the picture in an effective way. Enter the Notice to Withhold. The Notice to Withhold, despite its quaint nomenclature, is a statutory seizure order. The Notice to Withhold directs the awarding body, pursuant to its mandatory obligations under the Labor Code, to

withhold *"from money due or which becomes due to the contractor"* monies for transmittal to DLSE (non-compliance by the awarding body may be a crime). The money is to be paid to DLSE for civil penalties assessed under the Labor Code, and for alleged wage claims asserted by DLSE. In the event the workers cannot be found (including "unknown" workers alleged to be owed wages, *see*, Part III), the wage claim money goes into a trust fund, from where it goes into the State's general fund, whenever the trust fund exceeds $200,000.[5]

The Notice to Withhold seizes money due, not merely in words but in action. There can be no monies available for transmittal to the DLSE, as payment of civil penalties, or wage claims, unless money has been determined to be due under the public works contract by the awarding body. The Notice to Withhold does not terminate the awarding body's contractual obligation to pay the money due; it seizes the money as it becomes due.

DLSE continues to insist, in this case, that the right to money due under a contract, for work performed, is not property, because it doesn't rise to the level of entitlements such as a horse trainer's license or a college teacher's tenure rights. DLSE contends that G&G, by asserting that the right to receive money due is a property right, is trying to create some new form of property, that will cause western civilization to collapse. According to DLSE, all contract law will become federal law, if regulatory enforcement officials are not granted the unfettered right to seize money due under a contract,

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[5] While not particularly relevant to this case, it may be worthy of note that there is a seldom-used provision of the Labor Code, which allows an awarding body to establish a Labor Compliance Program (LCP), which if approved by DLSE, allows the awarding body to keep the civil penalties it collects pursuant to the LCP, as an incentive to enforce the Labor Code.

without concern for the Due Process Clause. Yet due process rights for seizures under state law are well-established in other contexts, and those subjected to such established procedures are not inundating the federal courts. This case does not establish a right to sue in federal court for project specific disputes, but merely the obligation of the State of California to establish a procedure.

Contrary to the views expressed by, and in support of, DLSE, the right to money due under a contract is not a new-found property right, just created by the Ninth Circuit. Before John Hancock put his John Hancock on the Declaration of Independence, the right to money due for work performed was property. When the founding fathers wrote the Fifth Amendment, and later the Fourteenth Amendment, they may not have been thinking of statutory penalties for violations of not-yet-created prevailing wage laws, but they were definitely thinking of the right to money due for work performed. This particular stick, in the bundle of sticks we call property, is so old, that DLSE, and its supporters, seem to have forgotten about it, or worse yet, inadvertently thrown it on a holiday fire. Speaking of the holidays, the inevitable chorus of reply will be that workers too have rights, as they surely do. One Court noted that bankrupting a contractor with unproven and untested seizures of money, pursuant to the government's regulatory power, may well put those very workers out of work. But more to the point, workers are deserving of protection and concern, including the protection of vigorous law enforcement by DLSE, which is, after all, the reason for its existence. However, when DLSE, acting as an enforcement arm of the State, enforces the law in ways that involve the seizure of property, process is due, and in this case, long overdue.

Since this summary of argument has undoubtably droned on far too long, we will not belabor the difference between a request for payment, and a seizure of a payment that is due, although this is the central distinction between this case and the *Sullivan* case. This case asks the question of what happens *after* the insurer in *Sullivan* determines that payment *is* due. Is the money freely available for seizure by regulatory enforcement officials without due process? Does such a seizure of the money due, on the purported basis of alleged violations of the law, invoke the Due Process Clause?

If DLSE issued a Notice to Withhold for labor law violations on a private job, due process would be required. The Due Process Clause does not evaporate because the owner of the project may be a public entity, or a private entity receiving public funds.

The Notice to Withhold attaches only after it has been determined that money is due. While the Notice to Withhold intends that money be paid to the DLSE, the money must first remain suspended in a state of limbo, for an indeterminate amount of time. From the contractor's point of view, the time is measured in years. DLSE may receive the money much sooner, for if the contractor does not file and serve notice of a lawsuit within ninety days of completion of the work, the seizure becomes permanent, and the money is transferred from limbo to DLSE. If the contractor does file the lawsuit, the money remains suspended in limbo until completion of the lawsuit, including exhaustion of DLSE's appellate rights. You may be wondering whether this procedure allows enforcement officials to gain unfair leverage from excessive Notices to Withhold. But rather than ponder such a question, let us return to the point, which is process due. The point of this case is that process is due for the seizure, while the money seized remains in regulatory purgatory, awaiting

the completion of the litigation. A further question is whether any process is due before the seizure becomes permanent, by the self-executing nature of the procedure. A third question is whether the targeted subcontractor, who bears the loss, is entitled to a hearing. The Court of Appeals held that a hearing "of some sort" is required to determine if a basis for the seizure exists, pending the marathon of litigation, or for those whose legs can't last the twenty-six miles.

The state action argument, raised for the first time four years into the litigation, invokes the age-old duck test. If it looks like a duck, walks like a duck, and quacks like a duck, it's a duck. This case is a challenge to the conduct of DLSE, a state actor.

To G&G's surprise (believe it or not, G&G is not a major player in the halls of power in Sacramento), DLSE revealed in its brief that new legislative changes are pending, in response to this lawsuit. The new legislation includes three familiar elements – the Notice to Withhold procedure, large-scale statutory ambiguities, and DLSE's plenary power to implement and enforce the statutes by adoption of regulations, and otherwise. Needless to say, DLSE continues to assert that its seizures of money are beyond the reach of the Due Process Clause, despite the fact that the new statutes, make even more clear than it already was, that the procedure is a regulatory enforcement mechanism.

DLSE asserts a split among the Circuit Courts. G&G has found only two Circuits who have considered whether a seizure, of money due, under prevailing wage laws, invokes the Due Process Clause. The Second Circuit and the Ninth Circuit (in this case) have both answered in the affirmative. In both Circuits, a breach of contract claim does not invoke the Due Process Clause. There is no split among the Circuits. The Circuits are unanimous. Due process is required for regulatory seizures. Such seizures are not a mere breach of contract.

Of course, a person is free not to undertake public works projects. All businesses may evade all regulatory enforcement action, by not engaging in business. The Notice to Withhold Procedure gives DLSE the power of *de facto* debarment of contractors from public works. The Notice to Withhold Procedure can, and does, put contractors out of business. Electing to go out of business is not an adequate remedy. Under such a theory, there are no constitutional limits on the seizure of property, in a commercial context, since a person may always choose not to do business. Business risk should not be defined as including a governmental right to seize property without due process.

The property right to money due for services rendered is of ancient origin, and derives in this case from the awarding body's contractual activity as a marketplace participant. Regulatory labor laws are not an essential ingredient to the creation of the property right. The right to payment due under a contract would exist in the absence of the statutory scheme for seizing money due, to pay civil penalties and purported wage claims.

Property may not be defined, by statute, as incorporating a governmental right of seizure. Enforcement mechanisms which seize money to pay civil penalties and forfeitures do not define property; they seize property. Characterizing such enforcement mechanisms as a definition of property logically implies that all property can be defined as subject to government seizure. The promise of property in America means much more. "Individual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993).

Seven decades ago, when the prevailing wage laws were adopted in California, the power of government to regulate business activity may have been debatable.

Today, the power to regulate is well-established. Acceptance of the position urged by DLSE, and the *amicus curiae*, would constitute a quantum leap in the expansion of such power. The DLSE's contention is that States may enforce regulatory laws by seizing money without notice or hearing. Acceptance of such a position by this Court could lead to the adoption of a myriad of laws, mandating seizure of money due, without notice or hearing. Adherence to constitutional restrictions in the enforcement of regulatory laws is a requirement at the core of the Due Process Clause. Constitutional constraint on enforcement officials is no less important when the owner of property happens to be a public entity, acting as a marketplace participant, or a private party receiving public funds. The power of State officials is not limited merely by their good intentions, which may be disregarded or misapplied at their whim. Constitutional limitations have been established to prevent the abuse of such power. Thomas Jefferson said, "let us hear no more of faith in men, but bind them to the Constitution."

VII. DLSE'S CONTENTION THAT THIS CASE DOES NOT INVOLVE STATE ACTION IS INCORRECT

G&G has asserted throughout the five plus years of this litigation that it has standing to challenge the constitutionality of the DLSE seizure procedure as both a subcontractor, *and as a prime contractor*. The Court of Appeals apparently concluded that it did not need to reach the issue. G&G has standing as both a prime contractor and subcontractor, to challenge the DLSE procedure for seizing a prime contractor's money. G&G also has standing to challenge the seizure of a subcontractor's money. Unlike *Sullivan*, in which a judgment was sought against a private party, G&G sought and obtained a judgment only against a state actor.

The first and most critical right that needed to be vindicated in this case was the right to a hearing, for someone, anyone. Under existing law there is no right to a hearing for anyone. The Court of Appeals said that there should be a right to a hearing for everyone whose money was seized. The Court described those who shall have the right to a hearing as "contractor," "subcontractor," "G&G and others." DLSE, quite appropriately, has interpreted the requirement as a hearing for the prime contractor and targeted subcontractor (in its regulations, and its anticipated statutes, which were adopted to respond to the judgment in this case). DLSE contends that the seizure of the subcontractor's money is not state action. The judgment is sustainable without having to reach this issue (*i.e.*, G&G has standing to challenge seizure of the prime contractor's money). Nevertheless, we examine the issue in light of *Sullivan*.

A. The Pass-Through Of The Seizure From The Prime Contractor To The Subcontractor Is State Action

In *Sullivan*, the Court explained that a private party's resort to the machinery of the State, to effect an ex parte seizure of property is state action. *Sullivan*, 119 S.Ct. at 989. In this case, state action is even more severe. Here, the machinery of the State is thrust upon a private party to effect an ex parte seizure, purportedly to advance the regulatory purpose of the State. *See, Labor Code* §1774 [statutory duty imposed on subcontractor to pay prevailing wages.] DLSE speaks of the prime contractor's discretion to pay the subcontractor. DLSE grants the prime contractor discretion to absorb the loss from DLSE's targeting of the subcontractor as alleged violator of the Labor Code, or alternatively, the prime contractor may

accept the role of DLSE's enforcement agent. Significantly, *Labor Code* §1729 grants a safe harbor to the compliant prime contractor. The net effect is that the subcontractor bears the burden of the civil penalties and alleged wage claims, by becoming the transferee of the seizure. The prime contractor is enlisted by DLSE in the transfer as a mere conduit, or at most joint participant, by the hammer of economic compulsion. The prime contractor is drafted into the fray, only after DLSE interjects itself into the contractual relations of the project participants, by seizing money due, and which will become due, to the prime contractor. DLSE identifies the subcontractor as the alleged violator of the Labor Code, thereby rendering the prime contractor's pass-through inevitable. For example, on the CSU job, DLSE stated that it sent G&G, as subcontractor, a request for payroll reports (albeit to a wrong address), and transmitted its Notice to Withhold with a letter specifically targeting G&G; on Culver City Hall, DLSE asserted that G&G had failed to pay "unknown workers"; and on the San Joaquin project, DLSE asserted that G&G had mis-classified workers. *See*, Part III.A, *supra*.

The injured subcontractor, who is looking for his money, is confronted with a prime contractor who says "I don't have it," and the DLSE who says "I didn't take it." The money is held by an awarding body, who says "I don't want it." All the while, no hearing rights accrue. DLSE concedes the subcontractor's right of equitable subrogation, and the potential of an assignment, from a prime contractor, who himself has no right to a due process hearing. The subcontractor's predicament is not the result of "judgments made by private parties without standards established by the state" or "state inaction, or . . . a legislative decision not to intervene in a dispute," but rather the subcontractor is directly in the cross-hairs

of a pro-active State enforcement agency. *Sullivan*, 119 S.Ct. at 987. State action is manifest.

B. G&G Has Standing As A Subcontractor To Challenge The Constitutionality Of The Seizure Of The Prime Contractor's Money Due

G&G suffered a direct injury from the seizure of the prime contractor's money due and, therefore, has standing to challenge the constitutionality of that seizure. The injury to G&G, as a subcontractor, from the seizure of the prime contractor's money due, was a direct injury caused by the DLSE. *See*, *G&G*, 156 F.3d at 900. (Pet. App. A-26). No other result makes sense. The prime contractor suffers no injury, to the extent the seizure is passed through to the subcontractor. Obviously, the seizure causes an injury. If the prime contractor is not injured, the injury must be suffered by the subcontractor. In *J&K Painting v. Bradshaw*, 45 Cal.App.4th 1394, 1399; 53 Cal.Rptr.2d 496, 499 (1996) the Court held that a subcontractor suffers direct injury from DLSE's Notice to Withhold:

> "According to the Commissioner [DLSE], PaintCo [subcontractor] was not aggrieved by the assertedly illegal withholding order because the withholding of funds was directed against Amoroso, the general contractor. The Commissioner does not dispute, however, that Amoroso in turn withheld funds from PaintCo, as section 1729 expressly empowered it to do. PaintCo was therefore directly aggrieved by the withholding, and possesses a direct interest in the determination of its lawfulness." *Id.* at 1399.

DLSE asserts that a subcontractor has a direct right of action against the awarding body to recover monies withheld. "DLSE has continued to take the position in this litigation that equitable subrogation permits the *subcontractor to stand in the shoes of the prime contractor* . . . As

an agency empowered to administer the prevailing wage law in California, its determinations in this respect have been accorded great weight in the California courts."[Emphasis added]. (Petitioner's Brief, p. 36).

A subcontractor on a public works project may not be terminated by a prime contractor, except on statutory grounds after a hearing before the awarding body. *Cal. Pub. Cont. Code* §4107. California law imposes a statutory duty on a prime contractor to pay a subcontractor out of monies paid by the awarding body. *Cal. Pub. Cont. Code* §§7107, 10262, 10262.5.

The DLSE seizure of the prime contractor's money due causes direct injury to the targeted subcontractor. G&G, as a targeted subcontractor, has standing to challenge the constitutionality of the DLSE seizure. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Warth v. Seldin*, 422 U.S. 490, 505 (1975). This case concerns the conduct of DLSE, as state actor.

C. Even If G&G, As A Subcontractor, Suffers An Indirect Injury, G&G Has Standing To Seek Declaratory And Injunctive Relief With Regard To DLSE's Conduct

Even if the injury to G&G is indirect, G&G has standing to challenge DLSE's actions. *Lujan, supra, Warth, supra*. DLSE asserts that a targeted subcontractor "stands in the shoes of the prime contractor" with regard to an action to recover the money held by the awarding body. If release of the prime contractor's money did not redress the subcontractor's injury, why would the subcontractor "stand in the shoes of the prime contractor?" DLSE seems to contend that this is the case of the phantom seizure. The prime contractor's money is taken, but he suffers no injury because it is transferred to the subcontractor, and so the prime contractor has no injury to redress, while the

subcontractor, who suffers the injury, has no redress against the one who caused it, DLSE.

D. G&G Has Standing As A Prime Contractor

G&G has standing to challenge the Notice to Withhold Procedure as a prime contractor. Standing requires an injury that is concrete and particularized, and actual or imminent. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The pleadings, and facts, show that G&G was being targeted, on an ongoing basis, by DLSE. *See*, Part III.A, *supra*. G&G's complaint alleged that "Plaintiff has performed work as both a subcontractor and prime contractor on various public works projects which are subject to the prevailing wage requirements set forth in the California Labor Code. Plaintiff intends to continue performing work on public works projects in California as a subcontractor and as a prime contractor." Jt. App. 67. G&G's motion for summary judgment established, as an undisputed fact, that "Plaintiff has performed and intends to continue to perform work, on a number of public works projects in the State of California. Plaintiff has performed such work, and intends to perform such work in the future, as both a subcontractor, and prime contractor." Jt. App. 182, 190. The motion further established that "DLSE has issued Notices to Withhold on account of alleged violations of the prevailing wage law by Plaintiff where Plaintiff has acted as a subcontractor, and a prime contractor. . . . For example, G&G was a prime contractor for the Anaheim City Public Utilities Project for which a Notice to Withhold was issued." Jt. App. 183, 190, 191. The facts show that G&G suffered an actual injury from an ongoing series of DLSE actions. The injury occurred to G&G as both a subcontractor, and as a prime contractor. The injury was concrete and particularized. The injury was both actual and imminent. G&G

had actually suffered the injury as a prime contractor. Given G&G's intention to continue to do business as a prime contractor, further injury was imminent. G&G had standing to challenge the Notice to Withhold Procedure as a prime contractor.

VIII. THE NOTICE TO WITHHOLD PROCEDURE CAUSES A DEPRIVATION OF A PROPERTY INTEREST

DLSE argues that the prevailing wage requirement is a condition precedent to payment under the public works contract. Unfortunately, no one told the awarding body, who, unlike DLSE, is a party to the contract. *See, Lusardi, supra*. So while DLSE contends that the condition precedent to payment under the contract has not yet occurred, it issues orders to the awarding body, requiring that payment be made, but not to the contractor, who has been determined by the awarding body to have earned the money due for work performed, but instead to DLSE, who need not prove anything, to anyone. Jt. App. 195-222 [Notices to Withhold]; *Labor Code* §§1727, 1728, 1776(g) [withholding is from "money due contractor" and "progress payments then due"]; *Cal. Pub. Cont. Code* §§9203, 10621 [awarding body makes proprietary determination of when money is due].

This Court has held that a deprivation of property occurs when an entitlement grounded in state law is removed for cause. *See, Logan v. Zimmerman*, 455 U.S. 422, 101 S.Ct. 1148, 71 L.Ed.2d 265 (1982). This Court has held that the right to money due is property. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969) [wages due]; *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) [rent due]. California law provides that decisions about payment under a public works contract are to be made by

a party to the contract, based on its discretion to exercise proprietary judgment. *Cal. Pub. Cont. Code* §§9203, 10261. DLSE seizes the payment, to pay the secretly assessed civil penalties and wage claims derived from the unproven and untested allegations of Labor Law violations. Thus an awarding body, upon having made the determination that payment is due under the public works contract, but having been served with a Notice to Withhold by DLSE, makes the payment, but not to the prime contractor. The payment is made to DLSE, or held as an escrow fund, until all litigation rights have been exhausted, including the DLSE's rights of appeal. *Labor Code* §1730-1733. (Technically, the awarding body is the nominal defendant in the lawsuit, but DLSE defends the case as real party interest.) This brings us to the new math: work performed + work accepted + payment approved + payment made + payment diverted for penalties and third party claims = no deprivation of property, or so says DLSE. Consider the facts of *James Daniel Good, supra*, where the property included the right to money due for rent. If the tenant had been a public entity, the seizure would, nevertheless, have been a deprivation of the landlord's property. It is true, that in this case the contractor is regulated, but if DLSE issued a Notice to Withhold for labor law violations on a private project, due process would be required. The result does not change because the owner is a public entity, acting as a marketplace participant, or a private entity receiving public funds. How can it be that the right of a college professor to teach English is property, but the right to payment due for services rendered is not?

DLSE relies on cases holding that a breach of contract does not constitute a deprivation of property. A contractual dispute over payment does not remove an established entitlement, for cause. The hallmark of property

does not exist. Also, when a public entity acts as a marketplace participant, concerned only with its proprietary interests, constitutional constraint is of less concern. *See, Wisconsin v. Gould,* 475 U.S. 282, 290 (1986); *Building Trades Council v. Associated Builders,* 507 U.S. 218, 229; 122 L.Ed.2d 565; 113 S.Ct. 1190, 1197 (1993). When money due under a contract is seized for civil penalties and third party claims, which are imposed for alleged violations of State law, there is a deprivation of property.

G&G is aware of only two circuits who have addressed the issue in this case, and both found there to be a deprivation of property. *See, General Electric v. Department of Labor,* 936 F.2d 1448 (2nd Cir. 1991); (the other is this case). These cases are not contrary to the well-established rule that the mere breach of a construction contract is not a deprivation of property, which is the rule in both the Ninth and Second Circuits.

DLSE relies on *O.G. Sansone v. Department of Transportation,* 55 Cal.App.3d 434, 127 Cal.Rptr. 799 (1976) for the proposition that the withholding is merely a contract dispute. The California Supreme Court held otherwise sixteen years later. *Lusardi, supra.* Furthermore, *Sansone* is poorly reasoned. *Sansone* misapplied due process law, and is inconsistent with other cases. *See, General Electric v. Department of Labor,* 936 F.2d 1448 (2nd Cir. 1991). *Sansone* is inconsistent with *Merco v. Los Angeles,* 274 Cal.App.2d 154 (1969), which provided that deduction of civil penalties from a prime contractor by the awarding body, for violation of the fair subcontracting act, is a deprivation of property. *Sansone* is even inconsistent with itself, to the extent that it held that the procedure is contractual. *Sansone* said:

> " 'There is no inhibition upon the state to impose such penalties for disregard of its police power as will insure prompt obedience to the requirements of such regulations.' "

Sansone distinguished *Merco* on the grounds that under the Labor Code, there was no discretion with regard to the amount of civil penalties to be imposed. As recognized in *Merco,* a hearing is required to ascertain the fact of the violation. *Merco, supra,* at 166, n.6. The distinction relied on by *Sansone,* no longer exists. In 1989, *Labor Code* §1775 was amended to provide discretion in the determination of the amount of penalties. *Sansone* is no longer good law.

DLSE relies on *Atkin v. State of Kansas,* 191 U.S. 207 (1908). *Atkin* merely held that the State may regulate commercial activity involving public entities as marketplace participants. *See, Metropolitan Water Dist. v. Whitsett,* 215 Cal. 400 (1932). *Atkin* does not hold that regulatory enforcement actions do not require due process. *See, General Electric v. New York,* 936 F.2d 1448, 1455 (2nd Cir. 1991).

A. The Notice To Withhold States That It Seizes Money Due Under The Contract

The Notice to Withhold is issued on standard forms, by enforcement officials of DLSE. The Notice to Withhold is issued to an awarding body. Among the examples included in the joint appendix is a Notice to Withhold alleging a wage underpayment of $1,739.33, and civil penalties of $21,350. Jt. App. 197-207. The Notice to Withhold states:

> "You are directed to withhold and retain from *any payments due* the general contractor the total amount of $23,121.28 which is the sum of all wages and penalties *forfeited pursuant to the provisions of Labor Code §1727* . . . if no notice of suit is received within ninety days . . . *the amount withheld shall be remitted to this office."* [Emphasis added] Jt. App. 199-200.

The Notice to Withhold further states: "This notice is given *pursuant to the provisions of section 1727 of the Labor*

Code. You are hereby required pursuant to said section to withhold *any and all payments which are or hereafter may become due* to the contractor hereinabove named to the extent of the total claim." [Emphasis added]. Jt. App. 213-214. A standard memorandum by DLSE to awarding bodies is included in the record at Jt. App. 201-202. The memorandum states, in part, as follows:

> "There is a statutory scheme within the Labor Code which sets such a high priority of payment of wages to workers that certain Labor Code provisions enable the *DLSE to enforce proper payment of wages and penalties* by mandating that the awarding body withhold funds set out in the notice to withhold (Labor Code §1727) . . . *Labor Code §1730 clearly mandates that the awarding body shall forward funds* withheld pursuant to a notice to withhold *directly to DLSE.*" [Emphasis Added] Jt. App. 201-202.

B. The Labor Code States That The Seizure Is Of Money Due

The statutes which provide DLSE with the authority to issue the Notice to Withhold expressly state that the withholding is a seizure of "money due." The statutes require penalties to be withheld from "progress payments then due." *Labor Code* §1727 provides that "before making payments to the contractor of *money due* under a contract for public work, the awarding body shall *withhold and retain therefrom*" the civil penalties and wages allegedly due. *Labor Code* §1728 provides that where full payment is made in the form of a single warrant, or other evidence of full payment, the awarding body shall accept from the contractor cash in an amount equal to, and in lieu of, the amount required to be withheld, and then shall release the final warrant or *payment in full. Labor Code* §1775 provides for the imposition of civil penalties by the Labor

Commissioner for violations of the prevailing wage laws. The statute states that "to the extent there is insufficient *money due a contractor* to cover all penalties and amounts due in accordance with this section, or in accordance with section 1813" the DLSE may maintain a lawsuit to recover the penalties and amounts due. *Labor Code* §1776(g), which provides for civil penalties for failure to keep and provide certain payroll records, states that "upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld *from progress payments then due.*"

C. The California Courts Have Stated That The Seizure By The Notice To Withhold Is Of Money Due

The California Supreme Court explained the statutory provisions for withholding as follows: "Deficiencies and penalties are to be withheld by the awarding body *from sums due* under the contract. (§1727)." *Lusardi v. Aubrey*, 1 Cal.4th 976, 986; 4 Cal.Rptr.2d 837, 842 (1992). The California Court of Appeals stated that "the contracting public entity (the 'awarding body') is required to withhold from any *payments due* the contractor all wages and penalties which have been forfeited by virtue of those violations. (§1727)." *J&K Painting v. Bradshaw*, 45 Cal.App.4th 1394, 1397; 53 Cal.Rptr.2d 496, 498 (1996).

D. The Notice To Withhold Seizes Money For Third-Party Claims

The civil penalties are not contract damages retained by the awarding body. The penalties must be transmitted to the DLSE for payment into the general fund of the State. *Labor Code* §1731.

The amounts seized for wage claims are not contract damages to be retained by the awarding body. The

monies are to be transmitted to the DLSE for disbursement to workers, or deposit into a trust fund for workers maintained by the Department of Industrial Relations. *Labor Code* §1731, 1775.[6] The Notices to Withhold issued by the DLSE expressly states that "the amount withheld shall be remitted to this office." Jt. App. 200.

DLSE is a statutory assignee of all workers in California with regard to claims for wages. *Labor Code* §96.7. The Notice to Withhold includes the following statement: "I am an authorized representative acting for the State Labor Commissioner. I execute this declaration *on behalf of the workers* whose names are set forth on the attached notices."

E. The Seizure Of The Prime Contractor's Right To Money Due Is Sufficient To Support The Judgment

It has been established that the Notice to Withhold seizes the prime contractor's right to receive money due under the contract. The money is paid, instead, into a fund to be used for payment of civil penalties and wage claims. The seizure of the prime contractor's right to receive money due under the contract is a deprivation of property. *Sniadach, supra, James Daniel Good, supra, General Electric, supra.* At this point, process is due. Vindicating a prime contractor's right to a hearing establishes that the procedure is unconstitutional, and provides most of the relief sought by G&G. Establishing the right to a hearing for a prime contractor remedies G&G's problem as a prime contractor, and mostly as a subcontractor, since

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[6] When the trust fund exceeds $200,000 monies are transferred to the State's general fund, not to the awarding body. *Labor Code* §96.7.

DLSE concedes an equitable right of subrogation for participation by a subcontractor, and a subcontractor may well be able to participate, in any event, as an assignee, witness, or joint participant. Establishing the prime contractor's right to a hearing establishes even more, because it follows that a targeted subcontractor has a due process right to participate. *See,* Part VII, *supra.* The injury to the targeted subcontractor is an injury, entitled to redress under due process principles. *See,* Part VII, *supra.* Although vindicating the right to a hearing with regard to the seizure of the prime contractor's money due is sufficient to decide the case, it is noteworthy that the Notice to Withhold invades two other property interests.

F. The Subcontractor's Property Interest In Money Due

The subcontractor's property interest in money due, actually includes two property interests; a statutory right to receive payment from the prime contractor's payment, and the old-fashioned money due for work performed.

A subcontractor has a statutory entitlement to the contract, *Cal. Pub. Cont. Code* §4107 [termination of subcontract allowed only on statutory grounds after a hearing]; and a statutory entitlement to payment from money paid to the prime contractor. *Cal. Pub. Cont. Code* §§7107, 10262, 10262.5; *Cal. Bus. & Prof. Code* §7108.5. The Notice to Withhold terminates these statutory entitlements. The targeted subcontractor who is owed money would be paid, but for the seizure of the prime contractor's payment due. The seizure is distinct from a contractual dispute with the awarding body, because the prime contractor, in acting as a mere conduit, or joint participant, for DLSE, passes through the seizure by DLSE. *See,* Part VII.

Similarly, the seizure terminates the targeted subcontractor's right to receive money due under the contract, even without regard to any statutory entitlements. *See, Labor Code* §1729.

In order for the prime contractor to pass through the loss it has suffered, there must be money due to the subcontractor. If there is no money due to the subcontractor, the prime contractor cannot pass through his loss. Thus, the constitutionality of the procedure must be determined in the context of when money is due to the subcontractor. (This was the situation G&G was in on the projects described in the statement of facts). The money due, is not paid, because of the seizure by DLSE. Where the subcontractor is the alleged violator of the law, who is suffering the economic burden, the subcontractor has the right to a hearing. *See, O'Bannon v. Town Court,* 447 U.S. 773, 789, n.22; 100 S.Ct. 2467, 2477; 65 L.Ed.2d 506 (1980).

G. This Case Involves Regulatory, Not Proprietary, Conduct, And Does Not Involve A Breach Of Contract Claim

Proprietory provisions of a contract are negotiable. The awarding body can make choices to accomodate the market. The Labor Code is non-negotiable.

In *Lusardi v. Aubrey,* 1 Cal.4th 976, 4 Cal.Rptr.2d 837 (1992) the California Supreme Court expressly held that the prevailing wage law creates statutory obligations, which exist without regard to the terms of any contract. The California Supreme Court analogized the function of the DLSE, in enforcing the prevailing wage laws, to that of a criminal prosecutor. *Lusardi, supra,* at 992.

Contractual remedies must be compensatory. An awarding body has no liability for civil penalties imposed under the Labor Code. *Aubry v. Tri-City Hospital District,* 2 Cal.4th 962, 969; 9 Cal.Rptr.2d 92 (1992). Similarly, an

awarding body has no liability for underpayment of wages to workers. *Id.* The money seized does not compensate the awarding body for damages. Damages claimed by the awarding body would be offset from the contract price, before the awarding body determines if there is "money due," which can be seized to pay penalties and wage claims.

The imposition of civil penalties for violations of State law are never a matter of contract. Penalty provisions in a contract are void. *See e.g.,* 1 Witkin, Summary of Cal. Law, Contracts §503 (9th ed. 1987). Civil penalties can be imposed only as an act of regulatory power.

The Court has explained that a governmental entity acts as a marketplace participant when, as an owner of property, it conducts business as would any private owner of property, with no interest in setting policy. *See, Building Trades v. Associates Builders and Contractors,* 507 U.S. 218 (1993); *Wisconsin v. Gould, supra,* [invalidated a statute which provided that three-time violators of the National Labor Relations Act could not bid on public works projects as being regulatory, not proprietary].

Dillingham v. County of Sonoma, 190 F.3d 1034, 1037-1038 (9th Cir. 1999) held that DLSE actions pursuant to the prevailing wage law are regulatory, not proprietary. In this case, DLSE stated in the District Court, as an undisputed fact, that "the Division of Labor Standards Enforcement, the agency mandated to enforce the prevailing wage requirements of the California public works law (California *Labor Code* §§1730-1850) has interpreted the purposes of the act to benefit workers and prevent unfair competition in the industry."

The California Supreme Court explained that there is a direct conflict of interest between the proprietary interests of the awarding body, and the regulatory interests of DLSE. *Lusardi, supra,* at 995.

DLSE "is the enforcing entity of the prevailing wage statute and . . . is not a participant in the various public works projects." *Department of Industrial Relations v. Fidelity Roof*, 60 Cal.App.4th 411, 420; 70 Cal.Rptr.2d 465 (1997). "When DLSE pursues only unpaid wages and not section 1775 penalties, it acts solely on behalf of the aggrieved workers." *Id.* at 427.

When an awarding body contracts, as an owner of property, for the construction of a building or other improvement, it acts as a marketplace participant. Disputes over performance, such as the quality or timeliness of work, etc., are proprietary in nature. However, the statutory mandate that an awarding body hold money, to secure payment of civil penalties and third-party claims for wages, does not involve marketplace activity. The awarding body is subjected to a statutory mandate to enforce the Labor Code, so as to promote the public policy of the State. The action of the awarding body pursuant to such mandate is regulatory, and not proprietary. In essence, the Labor Code mandates that the awarding body remove its marketplace participant hat, put on its governmental enforcement hat, and enforce the Labor Code. In so doing, the awarding body does not act as would any private owner of property. The awarding body acts as an enforcer of State law. *See, Aubry v. Tri-City*, 2 Cal.4th 962, 969; 9 Cal.Rptr.2d 92 (1992) [awarding body not liable for non-compliance with prevailing wage laws because "this is an injury that could not exist in an action between private persons."]

Regulatory conduct by states is subject to limitations not imposed on private parties because "Government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints." *Wisconsin, supra*, at 290. See, also, *Building Trades, supra*, at 229. An awarding body, pursuing its

proprietary interests, is constrained by the marketplace. DLSE officials, pursuing enforcement actions, are not constrained by market forces. DLSE does not manage a construction budget, or contemplate a need for bidders on the next project.

The seizure of money by enforcement officials pending extended litigation can have devastating effects. The constraint imposed by marketplace activity does not exist when enforcement officials act pursuant to the regulatory power of the State. The Brief of Amicus Curiae, Port of Oakland, quotes a law review article as stating: "The Due Process Clause's function of discouraging arbitrary government action is of limited importance when external constraints have the same effect. The most important external constraint for our purposes is the general effect that marketplace competition has on government behavior and individual choice." *Id.* at p. 7, n.4. DLSE is not subject to any such constraint, as it is not a marketplace participant engaged in proprietary conduct. As a law enforcement agency, DLSE can, and does, target contractors without regard to the proprietary concerns of the awarding bodies. An owner's risk from breaching a contract does not exist for DLSE. An owner who breaches a contract by arbitrarily refusing payment may suffer substantial damages, termination of work by the contractor, and/or rescission of the contract. An awarding body, acting as proprietor, is concerned with its desire to complete the work at the least possible cost. The awarding body must be concerned with not discouraging bidders on future contracts. DLSE has no such proprietary concerns. The cutting off of a contractor's cash flow can, and often does, put the contractor out of business. Excessive Notices to Withhold are inherently attractive, due to the leverage available to enforcement officials from such an

action. The right to sue, and obtain recovery of the money seized years later, is too little too late.

Judge Kozinski, dissenting in this case, stated that "[w]hen the government is acting as a commercial entity, taxpayers cajole it to act with all the ferociousness the marketplace demands." *G&G*, 156 F.3d at 910, n.2 (Pet. App. A-51). Judge Kozinski misses the point. This case is about releasing all the ferociousness of State enforcement officials, completely untethered to the mast of the Constitution.

H. The Holding Of The Court Of Appeals Is Consistent With *American Manufacturers v. Sullivan*

This case was previously remanded to the Court of Appeals, to be reconsidered in light of the recent decision in *American Manufacturers v. Sullivan*, 52 U.S. 40; 119 S.Ct. 977; 143 L.Ed.2d 130 (1999). The Court's prior order regarding *Sullivan* was issued in response to a Petition for Writ of Certiorari, by DLSE, that presented the question in this action is as follows:

> "Is a commercial contractor who claims that a public agency breached a contract by failing to make payment entitled by the Due Process Clause of the Fourteenth Amendment to anything more than an opportunity to pursue its contract claims through an ordinary State Court lawsuit?"

As explained in the discussion above, no such issue is presented by this case.

Sullivan involved the denial of a claim by a public insurance company. The Court held that the mere submission of a payment request did not establish an entitlement to payment. This case addresses the situation where the payment request has been approved, and the obligation to pay established. The question here is whether a

seizure of the right to receive the payment is a deprivation of property.

In *Sullivan*, enforcement officials did not seize money due under the insurance policy, for payment of civil penalties and third-party claims arising from an alleged violation of law. *Sullivan* did not involve money due, civil penalties, third-party claims, or regulatory enforcement action. *Sullivan* did not involve termination of an entitlement for cause. *Sullivan* involved classic proprietary conduct by a public entity. An employer could purchase insurance from the private insurer, or the public insurer.

This case is the flip side of the *Sullivan* coin. *Sullivan* involved denial of a claim by an insurance company. A due process violation did not arise, merely because the insurer was a public company. In this case, DLSE's enforcement action would require due process, if a private project were involved. The mere fact that the project owner may be public company, does not eliminate the need for due process.

Sullivan is similar to the cases which hold that a mere contractual dispute is not a deprivation of property. The breach of contract cases are inapplicable here for the same reason that *Sullivan* does not control. *See, G&G, supra*, 156 F.3d at 901-902 (Pet. App. A-31-32) [contract cases distinguished].

I. DLSE's Reliance On O'Bannon Is Misplaced

DLSE's reliance on *O'Bannon v. Town Court, supra* is misplaced. In *O'Bannon*, a nursing home received due process for termination of its medicare/medicaid certification. The patients claimed a right to additional process. *O'Bannon* does not apply to the facts of this case. In this case, neither a subcontractor, nor a prime contractor, receives due process. In this case, there is no hearing at which anyone can attend. G&G has standing, as a prime

contractor, and as a subcontractor, to establish the right to such a hearing. *See,* Part VII, *supra*. In *O'Bannon*, due process rights already existed for the nursing home, who had the financial incentive to exercise those rights.

Additionally, *O'Bannon* concerned an indirect injury. Even as a subcontractor, G&G asserts a direct injury. *See,* Part VII.B, *supra; G&G, supra,* 156 F.3d at 903 (Pet. App. A-26-27). Furthermore, *O'Bannon* expressly states that it does not apply to indirect injuries to targeted third parties. *O'Bannon, supra,* at 789, n.22; *G&G, supra,* 156 F.3d at 903 (Pet. App. A-26-27).

IX. THE DLSE'S CONTENTION THAT ADEQUATE REMEDIES EXIST IS INCORRECT

DLSE argues that the right to sue under *Labor Code* §§1730-1733, or under various other theories, is adequate remedy. The right of a contractor to sue does not address the deprivation in issue. The issue here is the seizure of money pending the final determination of such a lawsuit. The "temporary" seizure can be devastating in its effect. The release of the money seized, years later, does not remedy the injury suffered from cutting-off a contractors cash flow. This Court has held that notice and hearing for such a "temporary seizure" is required. *Sniadach, supra; James Daniel Good, supra; Fuentes v. Shevin,* 407 U.S. 67, 85; 32 L.Ed.2d 556, 572; 92 S.Ct 1983 (1972).

Contractual disputes over payment arise in a fundamentally different context, and are fundamentally dissimilar to regulatory enforcement action. *See,* Part VIII. G.

In a lawsuit to recover monies seized by a Notice to Withhold, the contractor has the burden of proof. DLSE is not required, at any time, to establish that adequate grounds existed for the issuance of the Notice to Withhold. A contractor's money may be held for years, even if DLSE did not have legitimate grounds to issue the Notice

to Withhold. The procedure provides tremendous leverage for enforcement officials, which case be misused. Excessive and improper seizures can be used to compel a contractor to accept demands not justified by the facts or law. The power of enforcement officials must be constrained by due process.

When a deprivation causes an ongoing injury, pending a full litigation of the issue, this Court has held that a hearing is required for the temporary seizure. *James Daniel Good, supra,* [ex parte proceeding to establish "probable cause" for seizure pending litigation inadequate], *Fuentes, supra,* at 99 ["probable validity" must be established], *Sniadach, supra,* at 343 ["probable validity" must be established]; *Bell v. Burson,* 402 U.S. 536, 540; 91 S.Ct. 1586 (1971) ["reasonable possibility of judgment" must be established]; *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 545-546; 105 S.Ct. 1487 (1985) ["reasonable grounds" must be established]. The type of hearing required varies, depending on the circumstances. In this case, no hearing of any type is provided. The Court of Appeals only specified that the hearing must be either a pre or prompt post-deprivation hearing. The Court of Appeals stated that the State should manage its own affairs in a manner consistent with the Constitution. *G&G,* 156 F.3d at 905. (Pet. App. A-40).

Generally, the Court balances several factors when considering what process is due: (1) The private interests, (2) the governmental interest, (3) administrative burden, and (4) risk of an erroneous decision. *See, Mathews v. Eldridge,* 424 U.S. 319, 335 (1976); *Cleveland, supra,* at 543. Consideration of the aforesaid factors in this case, establishes that the right to a lawsuit is not adequate process for the seizure, pending completion of the lawsuit to recover.

A. The Private Interest Is Substantial

The private interest at stake was aptly stated in *Bailey v. Secretary of the United States Department of Labor*, 810 F.Supp. 261 (D. Alaska 1993) as follows:

> "It is undisputed that plaintiff received no due process hearing by a neutral decision maker prior to suspension of the payments due her for contract work performed for the government. While the Department of Labor has commenced an administrative proceeding against plaintiff, it is undisputed that these proceedings will take from six months to a year to reach a conclusion as to whether or not plaintiff was in fact underpaying her employees and, if so, in what amount.
>
> It is undisputed that without the cash flow from the contracts, plaintiff will not be able to continue to perform the contracts. She will in substance be put out of business; and the ten employees who are employed under the two contracts in question will be out of work.
>
> In order to recover immediately (and hold for six months to a year) the sums of money arguably due plaintiff's employees, defendant has come perilously close to destroying plaintiff's business and, in the process, terminating the jobs of the ten employees who defendant would theoretically benefit – six months to a year from now."
>
> *Id.* at 262-263.

The California procedure creates the same risk to the business of the targeted contractor. Jt. App. 193-194 [G&G's business threatened], Jt. App. 341 [contractors often go out of business after prevailing wage claims].

The failure to provide a prompt hearing causes substantial harm to an important private interest. Cutting off

the cash flow to a contractor causes substantial injury, and can even force the contractor out of business. *Cf. Labor Code* §1777.1 [debarment from public works based on prevailing wage violations requires a pre-deprivation hearing]. *See, Berlanti v. Bodeman*, 780 F.2d 296, 300 (3rd Cir. 1985) [the right to bid on public works projects is a property right]; *Cal. Pub. Cont. Code* §4107 [public works subcontract can be terminated only on statutory grounds, after a hearing].

B. The Governmental Interest Is Not Affected By A Hearing

The governmental interest is in enforcing the Labor Code. A hearing to determine probable validity does not conflict with the governmental interest. The State has no legitimate interest in the baseless seizure of money. See, *Bell, supra*, at 540.

DLSE claims an interest in seizing the money before it is dissipated. Wage claims are protected by a surety bond (*Cal. Civ. Code* §§3247, 3248). Civil penalties are deposited in the State general fund. *Labor Code* §1731. "The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking. That protection is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding. See, *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9, 111 S.Ct. 2680, 2693, n.9, 115 L.Ed.2d 836 (1991) (opinion of SCALIA, J.) ('[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit')." *James Daniel Good, supra*, at 55-56. Contract payments on a construction project are made progressively over a substantial period of time. The risk that DLSE will not be able to recover civil penalties is minimal. A pre-deprivation

hearing is appropriate. When extraordinary circumstances justify foregoing a pre-deprivation hearing, the statute must be "narrowly drawn to meet any such unusual condition." *Sniadach, supra,* at 339. DLSE's interest in avoiding dissipation of funds cannot be impaired by the Court of Appeals requirement of a prompt post-deprivation hearing.

C. A Right To Hearing Would Impose No Administrative Burden

The procedure that had been provided by the State was a lawsuit. The law provides that the money must be held until the lawsuit is complete, pending appeal. Providing a hearing for probable validity could not be a burden. The hearing would only serve to weed out claims without merit.

D. The Risk Of Error Is Substantial With A Notice To Withhold

The risk of erroneous deprivation is high where the underlying determination involves factual disputes. *Cleveland,* at 543; *Chalkboard v. Brandt,* 902 F.2d 1375, 1381 (9th Cir. 1989). The risk of error is less "where the factual issue to be determined was susceptible of reasonably precise measurement by external standards." *Chalkboard, supra,* at 1381. For example, chemical testing of a horse for drugs, *Barry v. Barachi,* 443 U.S. 55, 65; 99 S.Ct. 2642, 2649; 61 L.Ed.2d 365 (1979); suspension of a driver's license for prior convictions, *Dixon v. Love,* 431 U.S. 105, 113; 97 S.Ct. 1723, 1727; 52 L.Ed.2d 321 (1979); prior issuance of a criminal indictment, *Federal Deposit Insurance Corporation v. Mallen,* 486 U.S. 230, 242; 11 L.Ed.2d 265; 108 S.Ct. 1780 (1988).

The determination of purported prevailing wage violations generally involves hotly contested factual disputes. *See,* Part III.A.

The balancing test weighs heavily in favor of a hearing to determine whether the Notice to Withhold has probable validity. The private interest is of critical importance. The public interest is completely satisfied by a prompt post-deprivation hearing, and not seriously effected by a pre-deprivation hearing. A hearing imposes no burden on the State at all. There is great risk of an erroneous deprivation.

The cases relied on by DLSE are not applicable to this case. DLSE cites *Parrat v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) and *Hudson v. Palmer,* 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), but DLSE acknowledges that these cases are distinguishable. DLSE concedes that in *Parrat* and *Hudson,* "the alleged destruction of the property did not stem from the proper implementation of an established State procedure, but rather, from the unauthorized and unanticipated acts of State employees." (DLSE's brief, p. 39). *Parrat* and *Hudson* involved claims for damages for torts of State officials. In fact, *Parrat* was overruled on the grounds that mere negligence does not constitute a deprivation of property. *Daniels v. Williams,* 474 U.S. 327, 330-331; 106 S.Ct. 662; 88 L.Ed.2d 662 (1986).

Unlike *Parrat* and *Hudson,* this case involves a continuing injury from a temporary, non-final seizure. In *Parrat* and *Hudson* a pre-deprivation hearing was not possible, and a prompt post-deprivation hearing unnecessary, as there was no ongoing injury. A State Court lawsuit was all that was possible, and all that was necessary to redress the injury. In this case, the State Court lawsuit does not address the injury from a wrongful seizure pending trial and appeal.

DLSE cites *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 771 (1977). *Ingraham* held that a pre-deprivation hearing was not required before administering corporal punishment in a public school. *Ingraham* is distinguishable for several reasons.

In *Ingraham*, the court held that a pre-deprivation hearing was impractical because of the enormous burden which it would place on the schools. A prompt-post-deprivation hearing was unnecessary because there was no ongoing injury. The problems of excessive burden and impracticability faced in *Ingraham* do not exist in this case.

In *Ingraham* the Court noted that excessive corporal punishment can result in civil and criminal liability. Hence, there was a substantial deterrent to erroneous acts. DLSE officials are immune from civil lawsuits for damages, and are not criminally liable for wrongful Notices to Withhold. No substantial deterrent exists.

Ingraham distinguished property right cases.

Ingraham involved the unique circumstances of school discipline.

The right to a civil lawsuit is not adequate process. In fact, it is no process at all with regard to the seizure pending the litigation. It is the substantial injury for this "temporary" seizure which the Court of Appeals remedied. A hearing is required to determine if grounds exist for the seizure, pending the State Court lawsuit.

X. THE LEGISLATIVE CHANGES REFERRED TO IN THE PETITIONERS' BRIEF SHOULD NOT AFFECT THE JUDGMENT

The DLSE's brief revealed, for the first time, legislative changes scheduled to take effect in July 2001. G&G was not previously aware that legislative changes had been proposed. The judgment in this case remains as vital

as ever, even if the legislative changes take effect. The case is not moot. If the Writ is dismissed because of legislative changes, the judgment should remain in effect.

"It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982). Where a case is moot because of the Petitioner's action, the judgment should not be vacated. *U.S. Bank Corp. v. Bonner*, 513 U.S. 18 (1994).

The anticipated legislation does not necessarily eliminate the challenged practice. Moreover, if the judgment were vacated, the legislation could be repealed. *Mesquite, supra*, at 289 [City could reenact the provision if judgment vacated]. Also, a case and controversy exists as to G&G's award of attorney fees, and as to pending proceedings under the existing law. Whether moot or not, the judgment should not be vacated.

The "new" legislation is not in effect. The legislative history establishes that it was a response to the judgment in this case (legislative history lodged with the Court). The expected legislative changes do not eliminate the need of prospective relief. The Notice to Withhold Procedure remains under the new statutes. The statutes are vague in numerous respects with regard to the right to a hearing. DLSE continues to assert that the Notice to Withhold does not implicate the Due Process Clause. The statutes provide that DLSE shall adopt regulations to implement the statutes. It is important that DLSE do so in the context of a judgment declaring that due process concerns must be honored.

The statutes provide for a new hearing procedure. The statutes are silent as to whether the time frames therein are mandatory or directory, whether money seized must be released if a hearing is not timely granted,

what is meant by "commencing a hearing", and when a hearing must be concluded. If the time frames in the new statutes are applied strictly, money seized can be held more than six months. A loose interpretation could allow a much longer seizure, without any hearing. These issues are not before the Court, and are not specifically a part of this action. They are relevant only in explaining why the judgment, determining that due process applies, is necessary and important. The judgment will guide DLSE's conduct, which is the purpose of declaratory relief. Furthermore, the statutes are not in effect, and can be repealed or modified.

This case has been pending for more than five years, even with a relatively quick summary judgment. If the judgment were vacated, DLSE could ignore the Constitution, and it could take another five years to address the issue. DLSE could then change the law again, and evade the judgment again.

G&G obtained a judgment for attorney fees. Although the amount of attorney fees was set by stipulation, DLSE appealed. The appeal is stayed, pending this Writ. DLSE has stated that if DLSE prevails, they will argue the attorney fee award should be vacated. In addition to the prospective relief discussed above, a case and controversy remains as to G&G's recovery of attorney fees. DLSE states in its brief that many cases under the existing law remain. Pet. Brief at 11. G&G has cases pending in state court with regard to Notices to Withhold issued under current law. The case is not moot as to G&G.

If the Court considers the case moot, it is respectfully submitted that the Writ should be dismissed as improvidently granted, but the judgment should not be vacated. To the extent the case is moot, it is because of the State's action, taken in response to the judgment in this case. DLSE participated in the legislative changes. A judgment

should not be vacated as a result of the Petitioner rendering it moot. *U.S. Bank Corp., supra.*

XI. THE JUDGMENT DOES NOT DEPEND ON ANY UNCERTAINTIES IN STATE LAW

The brief of Amicus Curiae United States suggests that the judgment in this case rests on forecasts of uncertain state law. The argument is incorrect.

The interpretation of state law was set forth as an uncontroverted fact in the motion for summary judgment, and not disputed by DLSE. Jt. App. 182, 332-335. A different interpretation of state law may not be urged in this Court, as a basis to reverse the judgment. *Bishop v. Wood*, 426 U.S. 341 (1941). The state law issues raised could not be determinative in any event.

The doctrine of abstention was never raised in the five years this case has been pending, except for a mention in the brief by the United States. The doctrine does not apply, and reliance thereon by DLSE has been waived.

XII. DLSE'S CONTENTION THAT G&G DID NOT PLEAD AND PROVE AN ENTITLEMENT IS INCORRECT

The factual pleadings regarding specific projects were relevant only to bolster G&G's standing to challenge the DLSE procedure. The arguments not raised in the District Court, in either DLSE's motion to dismiss, or opposition to motion for summary judgment, regarding the pleadings or evidence, were waived, and cannot be raised on appeal in this Court. *Singleton v. Wulf*, 428 U.S. 106, 49 L.Ed.2d 826 (1976).

The withholding of money from G&G was adequately plead, and proved, for purposes of this action.

With regard to the pleading – *See*, Jt. App. 68 [money presently withheld due to notices to withhold]; Jt. App. 69 [G&G deprived of earned progress payments]; Jt. App. 69-70 [G&G deprived of money by pass through withholding]. With regard to proof – *See*, Jt. App. 174-185, 332-335 [G&G's statement of uncontroverted facts, and response by DLSE]; Jt. App. 191 [money withheld from prime contractor and G&G by pending Notices to Withhold]; Jt. App. 193 [G&G's negotiated payment not received as had been agreed because of Notice to Withhold, not less that $120,000 being held, effect of notices to withhold is to cut off payments for work performed]; Jt. App. 195-222 [notices to withhold issued as to G&G and DLSE memorandum to awarding body state money due, or which becomes due must be held for transmittal to DLSE, letter from DLSE to awarding body and prime contractor states "Transmitted herewith is a copy of DLSE's Notice to Withhold with respect to subcontractor G&G Fire Sprinklers, Inc."].

G&G did plead, and prove that it disputed the assertion that it violated the prevailing wage law. *See*, Jt. App. 69 [complaint alleges Notices to Withhold were wrongful, incorrect, excessive]; Jt. App. 191 [declaration supporting summary judgment states G&G disputes and denies the alleged violations of prevailing wage laws]. The District Court did not litigate specific disputes regarding alleged prevailing wage violations, and had no reason to do so.

Respectfully submitted,

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California Labor Code

§ 21. Labor commissioner defined

"Labor Commissioner" means Chief of the Division of Labor Standards Enforcement.

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§ 90.5. State policy; enforcement of minimum labor standards; field enforcement unit; offices; enforcement plan; report to legislature

(a) It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions, and to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.

(b) In order to ensure minimum labor standards are adequately enforced, the Labor Commissioner shall establish and maintain a field enforcement unit which shall be administratively and physically separate from offices of the division which accept and determine individual employee complaints. The unit shall have offices in Los Angeles, San Francisco, San Jose, San Diego, Sacramento, and such other locations as the Labor Commissioner deems appropriate. The unit shall have primary responsibility for administering and enforcing those statutes and regulations most effectively enforced through field investigations, including Sections 226, 226.2, 1021, 1021.5, 1193.5, 1193.6, 1194.5, 1197, 1198, 1771, 1776,

1777.5, 2651, 2673, 2675, and 3700, in accordance with the plan adopted by the Labor Commissioner pursuant to subdivision (c). Nothing in this section shall be construed to limit the authority of this unit in enforcing any statute or regulation in the course of its investigations.

(c) The Labor Commissioner shall adopt an enforcement plan for the field enforcement unit. The plan shall identify priorities for investigations to be undertaken by the unit which ensure the available resources will be concentrated in industries, occupations, and areas in which employees are relatively low paid and unskilled, and those in which there has been a history of violations of the statutes cited in subdivision (b).

(d) The Labor Commissioner shall annually report to the Legislature, not later than March 1, concerning the effectiveness of the field enforcement unit. The report shall include, but not be limited to, all of the following:

(1) The enforcement plan adopted by the Labor Commissioner pursuant to subdivision (c), and the rationale for the priorities identified in the plan.

(2) The number of establishments investigated by the unit, and the number of types of violations found.

(3) The amount of wages found to be unlawfully withheld from workers, and the amount of unpaid wages recovered for workers.

(4) The amount of penalties and unpaid wages transferred to the General Fund as a result of the efforts of the unit.

Business and Professions Code

§ 7108.5. Prime building contractors and subcontractors; payment to subcontractors; withholding payment; violation; penalty

A prime contractor or subcontractor shall pay to any subcontractor, not later than 10 days of receipt of each progress payment, unless otherwise agreed to in writing, the respective amounts allowed the contractor on account of the work performed by the subcontractors, to the extent of each subcontractor's interest therein. In the event that there is a good faith dispute over all or any portion of the amount due on a progress payment from the prime contractor or subcontractor to a subcontractor, then the prime contractor or subcontractor may withhold no more than 150 percent of the disputed amount.

Any violation of this section shall constitute a cause for disciplinary action and shall subject the licensee to a penalty, payable to the subcontractor, of 2 percent of the amount due per month for every month that payment is not made. In any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to his or her attorney's fees and costs.

The sanctions authorized under this section shall be separate from, and in addition to, all other remedies either civil, administrative, or criminal.

This section applies to all private works of improvement and to all public works of improvement, except where Section 10262 of the Public Contract Code applies.

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§ 7107. Retention proceeds; withholding; disbursement

(a) This section is applicable with respect to all contracts entered into on or after January 1, 1993 relating to the construction of any public work of improvement.

(b) The retention proceeds withheld from any payment by the public entity from the original contractor, or by the original contractor from any subcontractor, shall be subject to this section.

(c) Within 60 days after the date of completion of the work of improvement, the retention withheld by the public entity shall be released. In the event of a dispute between the public entity and the original contractor, the public entity may withhold from the final payment an amount not to exceed 150 percent of the disputed amount. For purposes of this subdivision, "completion" means any of the following:

(1) The occupation, beneficial use, and enjoyment of a work of improvement, excluding any operation only for testing, startup, or commissioning, by the public agency, or its agent, accompanied by cessation of labor on the work of improvement.

(2) The acceptance by the public agency, or its agent, of the work of improvement.

(3) After the commencement of a work of improvement, a cessation of labor on the work of improvement for a continuous period of 100 days or more, due to factors beyond the control of the contractor.

(4) After the commencement of a work of improvement, a cessation of labor on the work of improvement for a continuous period of 30 days or more, if the public agency files for record a notice of cessation or a notice of completion.

(d) Subject to subdivision (e), within seven days from the time that all or any portion of the retention proceeds are received by the original contractor, the original contractor shall pay each of its subcontractors from whom retention has been withheld, each subcontractor's share of the retention received. However, if a retention payment received by the original contractor is specifically designated for a particular subcontractor, payment of the retention shall be made to the designated subcontractor, if the payment is consistent with the terms of the subcontract.

(e) The original contractor may withhold from a subcontractor its portion of the retention proceeds if a bona fide dispute exists between the subcontractor and the original contractor. The amount withheld from the retention payment shall not exceed 150 percent of the estimated value of the disputed amount.

(f) In the event that retention payments are not made within the time periods required by this section, the public entity or original contractor withholding the unpaid amounts shall be subject to a charge of 2 percent per month on the improperly withheld amount, in lieu of any interest otherwise due. Additionally, in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to attorney's fees and costs.

(g) If a state agency retains an amount greater than 125 percent of the estimated value of the work yet to be completed pursuant to Section 10261 * * * , the state agency shall distribute undisputed retention proceeds in accordance with subdivision (c). However, notwithstanding subdivision (c), if a state agency retains an amount equal to or less than 125 percent of the estimated value of the work yet to be completed, the state agency shall have 90 days in which to release undisputed retentions.

(h) Any attempted waiver of the provisions of this section shall be void as against the public policy of this state.

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§ 10261. Payments upon contracts; progress payments; withholding of percentage of contract price; warrants; electronic transfer

Payments upon contracts shall be made as the department prescribes upon estimates made and approved by the department, but progress payments shall not be made in excess of 95 percent of the percentage of actual work completed plus a like percentage of the value of material delivered on the ground or stored subject to or under the control of the state , and unused, except as otherwise provided in this section. The department shall withhold not less than 5 percent of the contract price until final completion and acceptance of the project. However, at any time after 95 percent of the work has been completed, the department may reduce the

funds withheld to any amount not less than 125 percent of the estimated value of the work yet to be completed, as determined by the department, * * * if the reduction has been approved, in writing, by the surety on the performance bond and by the surety on the payment bond. The Controller shall draw his or her warrants upon estimates so made and approved by the department and the Treasurer shall pay them. The funds may be released by electronic transfer if that procedure is requested by the contractor, in writing, and if the public entity has, in place at the time of the request, the mechanism for the transfer.

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§ 10261.5. Interest on unpaid progress payments; agency procedures on receipt of payment requests

(a) Any state agency which fails to make any progress payment within 30 days after receipt of the payment request from a contractor on a construction contract for an undisputed payment request, which was properly submitted by the contractor to the agency, shall pay interest to the contractor equivalent to the legal rate set forth in subdivision (a) of Section 685.010 of the Code of Civil Procedure. Any state agency which independently calculates the amount due on a progress payment and which fails to make a progress payment within 30 days of the first submittal of the estimate for each contract by the engineer, shall pay interest to the contractor equivalent to the legal rate setforth in subdivision (a) of Section 685.010

of the Code of Civil Procedure. In the event that the payment is not made within 30 days of receipt of the contractor's request or the first submittal by the engineer, and the Controller has processed the payment within 14 days of receipt of the request or submittal, the contracting state agency shall pay interest to the contractor equivalent to the legal rate set forth in subdivision (a) of Section 685.010 of the Code of Civil Procedure. In the event that the payment is not made within 30 days of receipt of the contractor's request or the first submittal by the engineer, and the contracting state agency has processed the payment within 16 days after receipt of the request or submittal, the Controller shall pay interest as provided in Section 685.010 of the Code of Civil Procedure.

For purposes of this section, a payment request shall be considered properly executed if funds are available for payment of the payment request, and payment is not delayed due to an audit inquiry by the Controller.

(b) Upon receipt of a payment request, each agency shall require:

(1) That each payment request be reviewed as soon as practicable after receipt for the purpose of determining that a payment request is a proper payment request.

(2) Any payment request determined not to be a proper payment request suitable for payment shall be returned as soon as practicable, but not later than seven days, after receipt, specifying the reasons that the payment request is not a proper payment request.

(3) The number of days available to a state agency to make a timely payment of payment request without

incurring interest shall be reduced by the number of days by which an agency exceeds the requirements of paragraph (2).

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§ 10262. Payments to subcontractors.

The contractor shall pay to his or her subcontractors, within 10 days of receipt of each progress payment, * * * the respective amounts allowed the contractor on account of the work performed by his or her subcontractors, to the extent of each * * * subcontractor's interest therein. The payments to subcontractors shall be based on estimates made pursuant to Section 10261. Any diversion by the contractor of payment received for prosecution of a contract, or failure to reasonably account for the application or use of the payments constitutes ground for actions proscribed in Section 10253, in addition to disciplinary action by the Contractors' State License Board. The subcontractor shall notify, in writing, the Contractors' State License Board and the department of any payment less than the amount or percentage approved for the class or item of work as set forth in Section 10261.

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§ 10262.5. Progress payments to subcontractors; time for payment; remedies; withheld payments; report

(a) Notwithstanding any other provision of law, a prime contractor or subcontractor shall pay to any subcontractor, not later than 10 days of receipt of each progress payment, * * * the respective amounts allowed the contractor on account of the work performed by the subcontractors, to the extent of each subcontractor's interest therein. In the event that there is a good faith dispute over all or any portion of the amount due on a progress payment from the prime contractor or subcontractor to a subcontractor, then the prime contractor or subcontractor may withhold no more than 150 percent of the disputed amount.

Any contractor who violates this section shall pay to the subcontractor a penalty of 2 percent of the amount due per month for every month that payment is not made. In any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to his or her attorney's fees and costs.

(b) This section shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise available to a contractor or a subcontractor in the event of a dispute involving late payment or nonpayment by a contractor or deficient subcontract performance or nonperformance by a subcontractor.

Additions or changes indicated by underline; deletions by asterisks * * *

(c) On or before September 1 of each year, the head of each state agency shall submit to the Legislature a report on the number and dollar volume of written complaints received from subcontractors and prime contractors on contracts in excess of three hundred thousand dollars ($300,000), relating to violations of this section.

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§ 9203. Payments for projects costing over $5,000; progress payments; limitation on amount

(a) Payment on any contract with a local agency for the creation, construction, alteration, repair, or improvement of any public structure, building, road, or other improvement, of any kind which will exceed in cost a total of five thousand dollars ($5,000), shall be made as the legislative body prescribes upon estimates approved by the legislative body, but progress payments shall not be made in excess of 95 percent of the percentage of actual work completed plus a like percentage of the value of material delivered on the ground or stored subject to, or under the control of, the local agency, and unused. The local agency shall withhold not less than 5 percent of the contract price until final completion, and acceptance of the project. However, at any time after 50 percent of the work has been completed, if the legislative body finds that satisfactory progress is being made, it may make any of the remaining progress payments in full for actual work completed.

(b) Notwithstanding the dollar limit specified in subdivision (a), a county water authority shall be subject to a twenty-five thousand dollar ($25,000) limit for purposes of subdivision (a).

Cal. Pub. Contract Code § 4107. Substitution, assignment, and subletting

A prime contractor whose bid is accepted may not:

(a) Substitute a person as subcontractor in place of the subcontractor listed in the original bid, except that the awarding authority, or its duly authorized officer, may, except as otherwise provided in **Section** 4107.5, consent to the substitution of another person as a subcontractor in any of the following situations:

(1) When the subcontractor listed in the bid after having had a reasonable opportunity to do so fails or refuses to execute a written contract, when that written contract, based upon the general terms, conditions, plans and specifications for the project involved or the terms of that subcontractor's written bid, is presented to the subcontractor by the prime contractor.

(2) When the listed subcontractor becomes bankrupt or insolvent.

(3) When the listed subcontractor fails or refuses to perform his or her subcontract.

(4) When the listed subcontractor fails or refuses to meet the bond requirements of the prime contractor as set forth in **Section** 4108.

(5) When the prime contractor demonstrates to the awarding authority, or its duly authorized officer, subject to the further provisions set forth in **Section** 4107.5, that the name of the subcontractor was listed as the result of an inadvertent clerical error.

(6) When the listed subcontractor is not licensed pursuant to the Contractors License Law.

(7) When the awarding authority, or its duly authorized officer, determines that the work performed by the listed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications, or that the subcontractor is substantially delaying or disrupting the progress of the work.

(8) When the listed subcontractor is ineligible to work on a public works project pursuant to **Section** 1777.1 or 1777.7 of the Labor Code.

(9) When the awarding authority determines that a listed subcontractor is not a responsible contractor.

Prior to approval of the prime contractor's request for the substitution the awarding authority, or its duly authorized officer, shall give notice in writing to the listed subcontractor of the prime contractor's request to substitute and of the reasons for the request. The notice shall be served by certified or registered mail to the last known address of the subcontractor. The listed subcontractor who has been so notified shall have five working days within which to submit written objections to the

substitution to the awarding authority. Failure to file these written objections shall constitute the listed subcontractor's consent to the substitution.

If written objections are filed, the awarding authority shall give notice in writing of at least five working days to the listed subcontractor of a hearing by the awarding authority on the prime contractor's request for substitution.

(b) Permit a subcontract to be voluntarily assigned or transferred or allow it to be performed by anyone other than the original subcontractor listed in the original bid, without the consent of the awarding authority, or its duly authorized officer.

(c) Other than in the performance of "change orders" causing changes or deviations from the original contract, sublet or subcontract any portion of the work in excess of one-half of 1 percent of the prime contractor's total bid as to which his or her original bid did not designate a subcontractor.

(10)
FEB 15 2001

No. 00-152

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In The

Supreme Court of the United States

ARTHUR S. LUJAN, an individual, in his official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California,

Petitioners,

v.

G&G FIRE SPRINKLERS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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INTRODUCTION

(A) G&G's Request for a Pre-deprivation Hearing

G&G, in what appears to be a major shift in its position in this case, raises some new arguments and relinquishes some of its previous contentions, including a substantial part of the rationale articulated by the Ninth Circuit in rendering the judgment below. While the State concedes that G&G is entitled to advance any argument for affirming the judgment which finds support in the record, and may even disengage and distance itself from the reasoning of the Circuit Court altogether to the extent it finds it unpersuasive, G&G goes one step too far. Thus, it now argues, *without having sought review of the decision below*, that it is entitled to relief beyond that ultimately granted by the Ninth Circuit.

G&G is therefore seeking nothing less than a ruling from this Court that a pre-deprivation hearing is mandatory in this case (Res. Br. 40 *et seq.*), despite the fact the Ninth Circuit expressly determined after granting the State's Petition for Rehearing in 1998 that a post-deprivation hearing was all that was constitutionally required to satisfy G&G's due process rights (Pet. A-18).[1] In other words, G&G is not simply asking this Court to affirm the

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[1] To bolster the new grounds it argues for upholding the judgment in place of the grounds adopted by the Ninth Circuit, G&G has improperly attempted to augment the record by lodging new documents at the time it filed its brief. Some of these documents relate to transactions other than the three projects (California State University at San Bernardino, Culver City City Hall, and San Joaquin Hospital) which are the subject matter of this case (Pet. A-23, Jt. App. 191). Petitioners recently filed a motion objecting to the consideration of these new documents.

existing judgment – it is asking for a new judgment which will be much more favorable to its interests.

The fact that G&G failed to file a petition for rehearing of its own in the Ninth Circuit following this determination, neglected to file a cross-petition for writ of certiorari in this Court, and did nothing to preserve the issue during the more than two years that have elapsed between the Ninth Circuit's modification and the submission of G&G's brief in the present proceeding, forecloses it from making such an argument at this time. In short, G&G must be deemed to have waived its rights by not timely asserting this point immediately after the modified opinion was issued.

As authority for its position that a pre-deprivation hearing is required in this case, G&G cites decisions of this Court involving the direct seizure of vested assets through state sanctioned forfeiture procedures (such as garnishment). Even assuming, for purposes of argument, that G&G had not waived the right to make this argument, its contention is nevertheless doomed to fail on the merits. Thus, the factual setting of the present case, involving a routine withholding of funds held by a party to a contract disputing the other party's entitlement to such funds, is in no way analogous to the special circumstances reflected in the cases upon which G&G relies. The two types of cases are, in fact, manifestly poles apart.

(B) Other Issues Raised by G&G

G&G contends as well that state action is present in this case because the withholding of funds from the prime contractor by the public entity which awarded the contract results in what it characterizes as an automatic "pass through" to the subcontractor (Res. Br. 20 *et seq.*).

No evidentiary support is cited to corroborate the existence of this purported unvarying pattern or practice and none appears in the record. It is significant that this is the first time in these proceedings that G&G has made this argument and that, even now, no proof is cited to in the record. At the same time, G&G does not seem to dispute that prime contractors who have had money withheld by the contracting government agencies under the provisions of the prevailing wage law have the discretion to withhold or not withhold the same amount of money from their subcontractors. No attempt is made, moreover, to reconcile the existence of such discretion with the alleged automatic nature of the withholding practices of the prime contractor in practice.

G&G responds to the State's claim that its pleadings in this case are defective by again insisting that the Amended Complaint filed in the District Court adequately sets forth a prima facie claim entitling it to relief. Once again it makes much of its allegation that the withholding of funds was "wrongful, incorrect, and excessive" (Res. Br. 49 *et seq.*). Established rules of pleading clearly require much more, however. G&G was at the very least legally obligated to allege 1) the existence of contracts with the prime contractors; and 2) that it had met all conditions precedent to payment under these contracts, including compliance with the prevailing wage law. The Amended Complaint alleges neither of these critical elements, does not sufficiently describe a valid property interest, and accordingly cannot serve as the basis for relief in favor of G&G. By failing to identify the nature of the property interest in question, G&G has effectively precluded the Court from analyzing the scope of this purported right for due process purposes.

Though G&G's abandonment in part of the reasoning of the Ninth Circuit is understandable in many respects in light of the major pitfalls it faces,[2] the new grounds it raises are no more persuasive or well taken than the erroneous grounds they replace, and are likewise utterly unsubstantiated by the record in this case. Furthermore, G&G has not undertaken to respond to other arguments contained in the Petitioner's Brief, and has fallen far short of establishing that the purported property rights it claims to possess are significant enough to warrant constitutional protection.

For the reasons stated herein, as well as for the reasons set forth in its initial brief, the State submits that the judgment below must be reversed.

I

THE REMEDIES PROVIDED TO G&G ARE SUFFICIENT TO MEET THE REQUIREMENTS OF DUE PROCESS

The Ninth Circuit found the pertinent provisions of the California Labor Code unconstitutional as applied

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[2] G&G does, however, adhere to the position of the Ninth Circuit that the claim is based on statute and not on contract. But G&G's rights, if any, are necessarily conditioned on the terms of the undisclosed subcontracts, even though the prime contractors may assign to G&G their own contractual rights against the State. The mere fact that certain of the terms of the contract between the public entity and its prime contractor is codified in the California Labor Code does not change the consensual nature of the legal relationships of the parties. Furthermore, if G&G agreed to withholding as part of its subcontract, it is bound by that agreement. Constitutional rights may be knowingly waived by contract. *Wall v. Parrot Silver & Copper Co.*, 244 U.S. 407, 410, 61 L. Ed. 1229, 37 S. Ct. 609 (1917).

because it determined that there was no available state remedy for G&G to contest the withholding of funds by the prime contractors on the three projects in question.

> "In this case, subcontractors like G&G are afforded neither a pre- nor post-deprivation hearing when payments are withheld."
>
> (Pet. A-69)

This critical statement, which is at the core of the Ninth Circuit's determination that there was a due process violation, is clearly erroneous. As the State has repeatedly shown, there is an entire arsenal of contractual and other remedies under California law at the disposal of public works subcontractors who find themselves in the position that G&G did here (see discussion at p. 34 *et seq.* of Petitioner's Brief).

These remedies, include, in the absence of an assignment of rights by the prime contractor, contractual claims for damages, recission, restitution, declaratory and injunctive relief, etc., an action for equitable subrogation, a petition for writ of mandate (*J&K Painting Co., Inc. v. Bradshaw*, 45 Cal. App. 4th 1394, 1402, 53 Cal. Rptr. 2d 1415), an action based on the statutory stop notice procedure, and a claim against the prime contractor's payment bond (see discussion in Pet. Br. 36-37). G&G needed only to avail itself of any one of these familiar remedies to secure a full and fair hearing on the merits of the dispute. It chose not to do so, envisioning its relief in the federal courts instead.

Conspicuous by its absence from G&G's Brief is any argument challenging the State's position regarding the existing availability of these enumerated remedies for public works subcontractors under state law. As we have seen, G&G appears, on the contrary, to have eschewed

the Ninth Circuit's determination that no valid state remedy exists in the present situation as an untenable argument, and to have conceded, as it must, that viable remedies exist under state law.[3]

(A) State Procedures Affording A Post-deprivation Hearing Are Sufficient To Comply With Due Process Requirements

While abandoning the Ninth Circuit's rationale that no available remedies exist under state law, G&G nevertheless argues that state remedies must be provided at a pre-deprivation stage to be adequate for purposes of due process. In support of its position that all existing state remedies are insufficient to satisfy due process requirements to the extent they do not mandate a pre-deprivation hearing, G&G relies on *Sniadach v. Family Finance Corporation*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969) and *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993) (Res. Br. 40-41, 43-44).[4]

---

[3] For example, G&G states "[t]he right to a hearing for a prime contractor remedies G&G's problems as a prime contractor, and mostly as a subcontractor, since DLSE concedes an equitable right of subrogation for participation by a subcontractor, and a subcontractor may well be able to participate, in any event, as an assignee, witness or joint participant in such a hearing" (Res. Br. 32-33); and "equitable subrogation permits the subcontractor to stand in the shoes of the prime contractor" (Res. Br. 23, 24).

[4] G&G does not advance the argument of the Ninth Circuit that section 1729 of the Labor Code would somehow ultimately impair G&G's contractual rights of recovery in the state courts (Pet. A-20). A careful and fair reading of this section leads to only one reasonable conclusion: that though the prime contractor's withholding is made lawful by that section where the subcontractor has failed to comply with the prevailing wage law, no presumption is made concerning ultimate ownership and liability regarding these funds. The Ninth Circuit's interpretation of this provision was tantamount to treating it as a conclusive presumption against the liability of the prime contractor for the funds. This construction was not warranted by the language of this section and was inconsistent with the well-established principle that state statutes are to be interpreted where possible in favor of their constitutionality. *Alabama Federation of Labor v. McAdory*, 325 U.S. 450, 461, 89 L. Ed. 1725, 65 S. Ct. 1384 (1945).

Even assuming G&G could sit back more than two years, seek no review, and now contend it is entitled to a more favorable result than the one issued by the Ninth Circuit, its argument would necessarily fail on the merits based on the clear weight of authority to the contrary.

Sniadach (a garnishment case) and *James Good* (where the federal government required forfeiture of real property based on drug activity), the cases in which G&G places its reliance, each involved the summary divestiture of established property interests. In *James Good*, it was emphasized that the requirement of a pre-deprivation hearing rested primarily on the fact that real property is unmovable and indestructible. The Court noted that it had not generally required pre-deprivation hearings in cases involving other types of property, even those including large items like yachts (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 40 L. Ed. 2d 452, 94 S. Ct. 2080 (1974)).

The relatively rare cases mandating pre-deprivation hearings are clearly no authority for the proposition that the same type of hearing is required, where, as here, a

governmental agency has possession of money and withholds payment to the other party based on a legitimate and good faith dispute concerning entitlement to this money. G&G has not cited and could not cite any authority to the effect that the requirement of a pre-deprivation hearing is necessary or appropriate in this latter situation.

A party in possession of disputed money or property would, in most cases, be deemed imprudent if he turned the money or property over to the other party solely because that party had made a claim. Principles of equity, for example, have long recognized the need for preservation of the status quo during the pendency of disputes between litigants over money or property. *University of Texas v. Camerisch*, 451 U.S. 390, 395, 68 L. Ed. 2d 175, 101 S. Ct. 1830 (1981). Furthermore, it has long been standard commercial practice in this country for a person or entity who possesses money or property claimed by another, and who disputes that other's claim, to withhold payment pending a resolution of the underlying dispute by a court or arbitrator. Expressing what can be argued to be a part of the underlying philosophy of *American Manufacturer's Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999), Justice Stevens wrote in his concurring opinion in that case, "[i]t is not unfair, in and of itself, for a State to allow either a private or publicly owned party to withhold payment of a state-created entitlement pending resolution of a dispute over its amount." 143 L. Ed. 2d at 153.

G&G has mistakenly taken the broad pronouncements of *Sniadach* and *James Good* and misapplied them to a situation involving significantly distinct facts. Neither of these cases constitutes authority for the proposition G&G advances because there was no direct seizure by the

state of a vested property interest in the possession of the other party in the case at bench.

Years ago Justice Powell warned, in a well-reasoned concurring opinion in *Logan v. Zimmerman*, 455 U.S. 422, 443, 101 S. Ct. 1148, 71 L. Ed. 2d 265 (1982), about the pitfalls of the broad application of due process principles articulated in cases involving certain facts to other cases involving markedly different facts, urging that the decision in each case must be governed by the individual circumstances of each case. That admonition is as apt an observation concerning the application of due process principles now as it was then. A careful reading of *Sniadach* and *James Good* can only lead to the conclusion that the requirements they articulate do not extend beyond the context of the fact situations posed. Principles that are developed in cases involving seizures of vested property interests simply have no application to a situation, as here, where a government agency in possession of funds merely refuses in good faith to pay a disputed bill.

Thus, in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611, 40 L. Ed. 2d 406, 94 S. Ct. 1895 (1974) this Court stated that "[t]he usual rule has been [w]here only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process if the opportunity given for ultimate judicial determination of liability is adequate." (Quoting *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931)).

If G&G has a property right within the meaning of the Due Process Clause of the Fourteenth Amendment at all, a proposition the State vigorously opposes (see Pet. Br. 24, *et seq.*), that disputed right is fully and adequately protected at a post-deprivation hearing of the kind provided under California law. Thus, G&G could have had

its day in court and a judgment on the merits of this dispute long ago had it simply invoked one or more of these straightforward remedies.

While it is to be expected that there may be delays in the processing and resolution of cases in the court systems of any local jurisdiction, most of these delays are generally not unreasonable. The State of California, the largest state in the union, will without doubt remain a solvent entity at the time a final judgment is entered in the case. Building subcontractors, on the other hand, as experience has repeatedly shown, are far less stable and predictable than other types of businesses.

> "[T]he vast majority of construction contractors, especially the smaller contractors are undercapitalized and may have virtually no assets. It is not uncommon for these contractors, may [sic] of whom have incorporated, to cease doing business the minute a claim for unpaid wages comes forth only to reopen under a different corporate entity the next day."

(Jt. App. 341)

G&G, like many building subcontractors, who according to its own admission "often go out of business" (Res. Br. 42), might have vanished from the scene itself if prompt withholding had not been implemented in this case, a development that would have been to the significant financial detriment of G&G's workers. While a pre-deprivation hearing benefits contractors like G&G, it is inherently subject to abuse and often ends in penalizing the workers – the people the prevailing wage law was enacted to protect.

(B) G&G's claim that a pre-deprivation hearing is required is not properly before this Court and is without merit in any event

After granting the State's Petition for Rehearing, the Ninth Circuit amended its prior decision on September 10, 1998, holding for the first time that a post-deprivation hearing met the requirements of due process (Petition A-18). In its initial decision in this case, the panel did not commit to which type of hearing was mandated (Petition A-69-70). The Court stated:

> "Here, we have no doubt that the state's interest in ensuring the payment of prevailing wages is sufficiently 'important,' *see Mallen*, 486 U.S. at 240, to justify the withholding of funds pending the outcome of whatever kind of hearing may be afforded."

G&G did not seek review of the Ninth Circuit's determination that a post-deprivation hearing was adequate either in that court or this Court. Nevertheless, more than two years later, having done nothing to preserve the issue in the interim, it now argues that this Court should impose the requirement of a pre-deprivation hearing in these cases.

While, as mentioned above, G&G is entitled to distance itself from the reasoning of the Ninth Circuit if it sees fit to do so, and may advance any alternative argument that finds support in the record to urge that the judgment be affirmed, it cannot play fast and loose with this Court and petitioners by demanding relief greater than that prescribed in the judgment issued by the Ninth Circuit, especially after having taken no steps previously to challenge that court's determination. *Neely v. Eby Construction Co.*, 386 U.S. 317, 330, 18 L. Ed. 2d 75, 87 S. Ct. 1072 (1967).

It is submitted that under no circumstances should G&G's request on appeal for a modification of the judgment, requiring a pre-deprivation hearing before funds may be withheld, be considered by this Court, the opportunity to relitigate this same issue having been waived by G&G's failure to seek review earlier.

II

THE DEPRIVATION OF PROPERTY COMPLAINED OF WAS NOT PURSUANT TO STATE ACTION

G&G argues for the first time that the procedure by which the prime contractor withholds monies from the subcontractor constitutes "state action" because the withholding results in an automatic "pass through" to the subcontractor (Res. Br. 20-22). No citation is made either within or outside the record in substantiation of this dubious proposition.

In *American Manufacturers Mutual Insurance Co. v. Sullivan, supra,* 526 U.S. 40, 53, this Court held, quoting *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 166, 98 S. Ct. 1789, 56 L. Ed. 2d 185 (1978), that the State can only be held responsible for private action "when it has exercised coercive power or has provided significant encouragement, either overt or covert, that the choice must be deemed that of the State."

While section 1729 of the California Labor Code plainly authorizes a prime contractor to withhold from a subcontractor a sum equivalent to that withheld from him, to the same extent as the Pennsylvania law authorized a workers compensation insurer to withhold medical benefits claimed, the prime contractor who withholds under section 1729 has no more been coerced or significantly encouraged to do so than the insurer in *Sullivan*

because without question, each acts at his own discretion.[5]

To assume, moreover, that the prime contractor will in all instances withhold a like amount from the subcontractor not only lacks documentation in the record, it is contrary to human experience and common sense. Many considerations necessarily enter into this kind of determination on the part of the prime contractor. An obvious factor is the strong possibility that if the prime contractor withholds from his subcontractor he will be buying all the expenses and nuisance of a lawsuit. Long term relationships exist in this, as well as other, industries, so that it is reasonable to expect that different treatment may be given to subcontractors who have a long history of dealing with a prime contractor. Instead of passing on the withholding, the prime contractor might agree to give the subcontractor additional time to correct a disputed item or items. The prime contractor may be holding substantial sums in progress payments payable to the subcontractor and therefore may defer passing through the sum withheld from it by the state because it is not at risk in recouping these withheld funds from the subcontractor in the future. In other words, the prime contractor is not always in the position of having "to absorb the loss" as G&G contends (Res. Br. 21-22), if it decides not to withhold itself. There are, no doubt, many other circumstances that come to mind which might

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[5] G&G confuses the test for determining standing to sue with the test for determining state action.

influence a prime contractor to decide not to withhold from his subcontractor.[6]

As the party attacking the withholding process, it was the burden of G&G to present competent evidence showing the existence of a custom and practice in the public construction industry of prime contractors automatically passing these sums through to their subcontractors. G&G has failed to plead or substantiate this claim and accordingly cannot prevail on this point.[7]

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[6] The argument that the Court should assume that the payments withheld were "due" and therefore established property interests (Res. Br. 29 *et seq.*) because the notices to withhold and some of the pertinent statutory language refers to them as such has at most a kind of surface appeal. The context is perhaps temporal, i.e. the payments were due at some point in time. Certainly in view of the clear requirements of the prevailing wage law we can assume that the Legislature and DLSE meant otherwise due because there is no doubt that compliance with the prevailing wage requirements was a condition precedent to payment. This seizing on a word to construct an entire legal theory is typical of G&G's reluctance to deal with the significant underlying facts in this case.

[7] G&G goes to great lengths to distinguish the so-called proprietary and regulatory functions of petitioner and the awarding bodies, incorrectly defining their roles in the process (Res. Br. 6-9, 14-15, 26-30). Thus "awarding body" is defined in section 1722 of the California Labor Code as a governmental "department, board, authority, officer or agent awarding a contract work public work." Clearly both are agencies of the State of California or its political subdivisions. The awarding body, moreover, has an independent duty to withhold funds for violations of the prevailing wage law even if not notified of these violations by petitioners. *J&K Painting Co., Inc. v. Bradshaw*, 45 Cal. App. 4th 1394, 1408, 53 Cal. Rptr. 2d 505 (1996). G&G also makes much of the fact that the Division of Labor Standards Enforcement sought "prosecutorial" immunity in another case with G&G, going outside the record in this case

III

G&G FAILED TO SUSTAIN ITS BURDEN TO SHOW AN ENTITLEMENT TO THE FUNDS WITHHELD

G&G filed this action seeking declaratory and injunctive relief. The allegations of the First Amended Complaint merely identify the parties, allege that G&G performed work on certain public works projects; that Petitioners issued notices to withhold under color of law; and that not less than $135,000 was withheld from prime contractors on the project who withheld a like sum from G&G; that no notice or hearings were given in connection with the withholding of these sums; and that the withholding was unconstitutional and was "invalid, illegal, and in deprivation" of G&G's rights (Jt. App. 63-70).

Conceding that it has the burden of proof in an action of this kind (Res. Br. 40), G&G asserts that these allegations are sufficient to establish its entitlement, sufficient to "clear" the necessary pleading "hurdles" (*Sullivan, supra*, 526 U.S. at 561) to establish a claim upon which relief can be granted (Res. Br. 49-50). This assertion, upon careful examination, proves to be little more than bluster.

Thus, nowhere in this First Amended Complaint does G&G allege that it was a party to a contract, let alone whether the contract was written or oral. Significantly, while G&G claims a property right for due process purposes, it does not even allege the terms of the contract,

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to establish this fact. The so-called "prosecutorial" immunity under federal law, however, extends far behind those who prosecute civil or criminal actions, and includes persons and agencies performing supportive and clerical functions. *Imbler v. Pachtman*, 424 U.S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976).

essential information to the ascertainment of the nature of this purported property right. Nowhere does G&G allege it performed all conditions necessary to be performed on its part under such contract, if any. Finally, G&G does not even allege that it complied with the prevailing wage provisions of its purported contract. G&G does not deny, furthermore, that it has bargained away its rights by contractually agreeing that the prime contractors could summarily withhold funds which might have been otherwise due.

The necessary elements required to be alleged in pleading a claim based in whole or in part upon a contract in California and virtually all other jurisdictions are: (1) the existence and nature of the contract, (2) plaintiff's performance or excuse for nonperformance of all conditions, (3) defendant's breach, and (4) the resulting damage to plaintiff. See, e.g., *Reichert v. General Insurance Co.*, 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321 (1968).

These fundamental elements of G&G's case had to be pleaded and proved, just as the claimants in *Sullivan* were required to plead and prove that the medical care they received was reasonable and necessary. The failure to allege these elements, which are the very foundation of its case, is fatal to the subcontractor plaintiff's right to proceed and can result in the dismissal of his case.[8]

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[8] Another of G&G's unconvincing arguments is the contention that it was both a prime and a subcontractor. While G&G may have filled the role of a prime contractor on other projects, none of these projects were involved in the present case. The Declaration of Itai Ben-Artzi submitted in connection with G&G's summary judgment motion clearly identifies the three projects (California State University at San Bernardino, Culver City City Hall, and San Joaquin General Hospital)

IV

G&G DID NOT SUSTAIN ITS BURDEN OF SHOWING IT WAS A "TARGETED" CONTRACTOR

Parroting the Ninth Circuit's unsupported and insupportable characterization of it as a targeted company (Pet. A-33-34, Res. Br. 39-40), while disputing the undeniable, that the withholding of funds from the prime contractor only affected it indirectly, G&G once more argues that it is not subject to the doctrine of *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 100 S. Ct. 2467, 65 L. Ed. 2d 506 (1980) because it falls within the so-called "targeted" exception to that doctrine.

In deciding, based on this exception, that *O'Bannon* did not apply, the Ninth Circuit merely stated, "[u]nlike the nursing home residents in that case, G&G is the target of the state's action here" (Pet. A-33-34). No explanation has ever been given and no evidence has ever been identified which would show how the panel reached this singular conclusion. (The determination was made *sua sponte*, G&G only taking up the argument after the panel did.) Not only do the Ninth Circuit and G&G fail to substantiate this conclusion, though the State has continued to call on them to do so (see Petitions for Rehearing in Ninth Circuit), a careful perusal of the record in this

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covered in the present lawsuit. Paragraph 8 of that Declaration recites that "the prime contractors for each of the respective projects have withheld payment from G&G on account of the notices to withhold" (Jt. App 191). Furthermore, it is academic whether G&G was a prime or subcontractor since in either case it possessed a right to review under a variety of legal theories (see discussion in Petitioner's Brief at p. 32 *et seq.*).

case fails to turn up any evidence worthy of the name to support this allegation. In arguing this point again in its brief, the best G&G seems capable of mustering is the lame statement, urged for the first time in this Court, that it "believed it was being targeted by DLSE, because of its non-union status" (Res. Br. 2). Supposition, which is no substitute for evidence, appears to have been the source of this tenuous theory from its inception.

Both the Ninth Circuit and G&G may have confused the foreseeable with the intentional. The mere fact that a government agency has reason to believe that its actions will have an impact on a third party does not, in and of itself, subject it to liability (see, for example, the series of federal decisions previously discussed where though an impact on a third party or third parties was indeed foreseeable, the courts found no targeting of the third party or parties (Pet. Br. 44)).

In view of the patent absence of any evidence in the record to support a finding that G&G was targeted, *O'Bannon* obviously applies and G&G must be barred from any relief since its injuries, if any, suffered as a

result of the withholding from the prime contractor are by definition indirect and, therefore, not actionable.[9]

CONCLUSION

The State of California struck a bargain with the prime contractors who successfully bid on its public works projects, a bargain that was based on enumerated specifications. Part of that bargain was that these prime contractors guaranteed that both they and the subcontractors under their control would pay prevailing wages to all workers employed on the job site. Having paid a premium to obtain this concession, the State had an absolute right to insist on full performance of these terms. In view of the well-known propensities of subcontractors toward insolvency, the State had reason to insist on a procedure where payments could be withheld in the first instance to insure that workers on the project would not suffer injury.

With a kind of "sinking ship" desperation, G&G abandons some of the central rationale of the Ninth Circuit, especially the indefensible finding of that Court that

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[9] The Amicus Brief submitted by the Solicitor General notes in passing two provisions of section 1775 of the California Labor Code which became effective January 1, 1998, opining that these provisions "might now support a finding of state action." (Sol. Br. 29-30). The constitutional implications of this 1998 enactment are clearly not before the Court here because the complained of withholdings in this case all took place in 1995. Moreover, these 1998 provisions also require inclusion of the new withholding obligations in the subcontract, raising again the issue of waiver of constitutional rights (see footnote 2, *supra*). *Fahey v. Mallonee*, 332 U.S. 245, 255, 91 L. Ed. 2030, 67 S. Ct. 1552 (1947).

adequate state remedies are nonexistent, and offers as a substitute a position that finds little support in logic or precedent, and which relies too much on "evidence" outside the record.

For the reasons advanced herein and in Petitioner's initial brief, it is submitted that the Ninth Circuit's decision in this case is without evidentiary support, has no foundation in established law, and must be reversed. *A Fortiori,* G&G's belated attempt to "sweeten" the judgment by requiring a pre-deprivation hearing must be rejected out of hand.

Respectfully submitted,

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No. 00-152

In the Supreme Court of the United States

ARTHUR S. LUJAN, LABOR COMMISSIONER OF CALIFORNIA, ET AL., PETITIONERS

v.

G & G FIRE SPRINKLERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

California's Labor Code includes provisions requiring workers on publicly funded construction projects to be paid no less than the prevailing rates determined by the State's Labor Commissioner. The Code specifies that, if a prime contractor or one of its subcontractors fails to pay its workers the specified wages, the amount of the underpayment plus penalties must be withheld from contract payments to the prime contractor on the project. A prime contractor subject to such withholding may, in turn, withhold the same amounts from contract payments to any subcontractor that has failed to pay its employees the prevailing wage. Respondent, a subcontractor that has been subject to withholding by prime contractors on three public works contracts, filed this action against various state officials, seeking a declaration that the withholding procedures violate due process. The questions presented are:

1. Whether respondent is deprived of a protected property interest, for Fourteenth Amendment Due Process Clause purposes, when a prime contractor withholds from respondent contract payments because of respondent's alleged failure to pay its employees the prevailing rate as required by respondent's contract.

2. Whether respondent has shown state action such that the alleged deprivation may be fairly chargeable to the State.

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No. 00-152

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns the constitutionality of provisions of California law that authorize state agencies to withhold payments from prime contractors on public works projects where a subcontractor fails to pay the mandated prevailing wages to its employees, and that permit the prime contractor, in turn, to withhold similar sums from the subcontractor. A number of federal statutes require employees on federally funded projects to be paid the prevailing wage and authorize federal officials to withhold underpayments from the contractor. See Davis-Bacon Act, 40 U.S.C. 276a *et seq.*; Service Contract Act, 41 U.S.C. 351 *et seq.*; 29 C.F.R. 5.1(a) (1998) (collecting related statutes). Although the court of appeals stated that its holding would not extend to the Davis-Bacon Act because of the Department of Labor's "extensive hearing and appeal structure," Pet. App. A37 n.11, the United States has an interest in whether, and in what fashion, constitutional due process requirements apply to government contract activities and the withholding of payments pending resolution of compliance disputes.

STATEMENT

1. For over a century, States have sought to ensure that workers employed on the public works projects they fund, like workers employed on similar private projects, are paid the locally prevailing wage for their labor. See, *e.g.*, *Atkin* v. *Kansas*, 191 U.S. 207, 208 (1903) (addressing 1891 Kansas statute). Congress adopted such a requirement in 1931. Davis-Bacon Act, ch. 411, 46 Stat. 1494, 40 U.S.C. 276a *et seq.* California's prevailing wage statute dates from 1937, and is patterned on the Davis-Bacon Act. See *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 319 (1997); Pet. App. A37 n.11.

Under the California Labor Code, workers on "public works" projects must be paid "not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed." Cal. Lab. Code § 1771; see *id.* §§ 1720 (defining public works).[1] The required prevailing wages are set by the Director of the Department of Industrial Relations. *Id.* § 1773. The obligation to pay no less than the specified rates extends both to the prime contractor, which has a direct contractual relationship with the contract-awarding body, and to any subcontractors the prime contractor hires. *Id.* § 1774.

When a prime contractor or its subcontractor fails to pay an employee the required prevailing wage, the prime

[1] Certain provisions of the California Labor Code were altered effective January 1, 1998. Because respondent seeks only prospective relief (a declaratory judgment and an injunction)—and is precluded by the Eleventh Amendment from using this suit to obtain an award of money from the State Treasury for past wrongs, see *Green* v. *Mansour*, 474 U.S. 64, 72-73 (1985)—we believe that the current version of the California Labor Code is relevant for present purposes. See *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 414 (1972) (where plaintiff seeks prospective relief, Court "must review the judgment * * * in light of [the] law as it now stands"). Where the Code has changed over time, we have attempted to indicate whether we are citing the pre-1998 or the current version.

contractor "forfeit[s]" a penalty of up to $50 per calendar day (or portion thereof) per affected worker. Cal. Lab. Code § 1775 (West 1989 & Supp. 2000). In addition, the difference between the prevailing wage and the amount actually paid must "be paid to each worker by the [prime] contractor"; and every public works contract must contain a stipulation to that effect. *Ibid.*[2] State law, moreover, expressly provides that, "[b]efore making payments to the contractor of money due under a contract for public work," the contracting agency "shall withhold and retain therefrom" the amount of any prevailing wage underpayments by the contractor *or* its subcontractor, plus penalties, as provided by law and the "contract for public work." *Id.* § 1727. Where money is withheld from a prime contractor on account of a subcontractor's failure to pay prevailing wages, California law makes it "lawful" for the prime contractor, in turn, to withhold like amounts from payments otherwise due to the subcontractor. *Id.* § 1729; see Pet. App. A22; Pet. 5. Contracting agencies generally may not withhold payments under Section 1727 "without a full investigation by either the Division of Labor

[2] Section 1775 was amended in 1998 to revise, among other things, the provisions regarding a subcontractor's failure to pay prevailing wages. See Pet. App. A115-A119; Cal. Lab. Code § 1775 (West Supp. 2000). The amended section provides: where the subcontractor fails to pay prevailing wages, the amount of underpaid wages shall be paid to the employees by either the contractor or the subcontractor (*id.* § 1775(a)); in order to avoid liability for the subcontractor's actions, the contractor must monitor the subcontractor's performance and take corrective action (including withholding funds from the subcontractor) if the prime contractor becomes aware of the subcontractor's failure to pay the wages (*id.* § 1775(b)); the contractor must withhold payments from the subcontractor if the Division determines that the subcontractor did not pay prevailing wages and the contract-awarding agency did not retain sufficient money to pay the employees (*id.* § 1775(c)); and, to the extent there is insufficient money due a contractor to cover all penalties and unpaid wages, the contractor and subcontractor are jointly and severally liable for the amount of the shortfall in any collection action brought by the Division, although collection efforts are to be brought first against subcontractors (*id.* § 1775(d)).

Standards Enforcement" or the contracting agency, except with respect to the final contract payment. Cal. Lab. Code § 1729.

If a contracting agency withholds payments from a prime contractor under Section 1727, the "contractor or [its] assignee" may bring suit against the awarding body to recover withheld wages and penalties. Cal. Lab. Code § 1733. Such a suit must be brought "within the 90-day period" following the "completion of the contract and the formal acceptance of the job" by the contracting agency, *id.* §§ 1730-1733, and the contractor or assignee has the burden "to establish [its] right to the wages or penalties withheld," *id.* § 1733. The Code provides that such a suit "on the contract for alleged breach thereof in not making the payment is the exclusive remedy of the contractor or [its] assignees with reference to those wages or penalties." *Id.* § 1732.

California has recently revised its Labor Code, effective July 1, 2001. See 2000 Cal. Legis. Serv. Ch. 954 (A.B. 1646) (West). Those amendments repeal Sections 1730-1733 (addressing the manner in which withholding may be challenged), and add a new Section 1742, which entitles both prime contractors and subcontractors to challenge a notice of assessment regarding failure to pay the prevailing wage through administrative proceedings, with a right of judicial review.

2. Respondent is a fire-protection firm that has worked as a prime contractor or subcontractor on a number of California public works projects. The Division of Labor Standards Enforcement concluded that respondent had, as subcontractor on three such projects, failed to pay its employees the required prevailing wages. The Division issued notices to the contracting agencies on those projects directing them to withhold payments from the prime contractors pursuant to Labor Code Section 1727. The prime contractors in turn withheld at least $120,000 from respondent. Pet. App. A23.

Respondent filed a complaint in federal district court against the California Labor Commissioner and other public officials and state agencies. The complaint alleged that, by issuing notices directing contracting agencies to withhold money from prime contractors on the affected projects, petitioners deprived respondent of a property interest without due process of law. Respondent sought declaratory and injunctive relief. Pet. App. A90-A106. The district court granted respondent's motion for summary judgment, holding that the pertinent provisions of the California Labor Code violate respondent's due process rights. *Id.* at A86.

3. The court of appeals affirmed that holding. Pet. App. A14-A48. The court first rejected petitioners' argument that respondent had failed to satisfy the causation and redressability elements of standing. The court found the causation element satisfied because, in its view, the State's action "targeted" respondent and "the prime contractors' only role in the dispute is that of a conduit." *Id.* at A26. The court also concluded that respondent's injury in any event "can be directly traced to the state's conduct" in issuing the notices that caused contracting agencies to withhold payments from prime contractors, and prime contractors to withhold payments from respondent. See *id.* at A28. The court further found that injury to be redressable because, if respondent prevails, withheld money must be released to prime contractors "who will be obligated by contract to pay it to [respondent]." *Ibid.*

Turning to the due process issue, the court of appeals found that respondent had a constitutionally protected property interest "aris[ing] from its public works contract * * * in being paid in full for the construction work it has completed." Pet. App. A30. And the court found that the withholding of payments from prime contractors had caused respondent to be deprived of that "interest in full payment for services rendered." *Ibid.* According to the court of appeals, the State's procedures were unconstitutional because

they afforded respondent no pre-deprivation or prompt post-deprivation hearing at which it could challenge the withholding. In particular, the court concluded that, under California law, subcontractors "are not given the right to bring suit," *id.* at A22, and thus "have no opportunity to be heard" on whether the violations occurred, *id.* at A36. In reaching that conclusion, the court did not rely on California state court decisions. It instead relied on its own construction of the relevant statutes, rejecting petitioners' contention that California law provides subcontractors with means of redress. *Id.* at A36-A37 & n.9.

Judge Kozinski dissented. The State, he explained, had included a prevailing-wage requirement as a term of its contracts. Pet. App. A48. When the State concluded that the prevailing-wage term had been breached, it was entitled—like any other contracting party—to withhold progress payments for that failure of performance. *Id.* at A49-A50. Nor had the State deprived respondent of a means through which it could challenge the withholding. Respondent, Judge Kozinski concluded, could sue the contract-awarding body under a theory of equitable subrogation. *Id.* at A50.

4. Following the court of appeals' decision, this Court decided *American Manufacturers Mutual Insurance Co.* v. *Sullivan*, 526 U.S. 40 (1999). *Sullivan* concerned the constitutionality of a Pennsylvania workers' compensation statute that authorized insurers to withhold payments for the treatment of work-related injuries pending independent review of whether the treatment was "reasonable" and "necessary." *Id.* at 44-47. This Court held that a private insurer's decision to withhold payment for a disputed medical treatment pending review did not constitute action "under color of state law" covered by 42 U.S.C. 1983. See 526 U.S. at 49-58. The Court also held that the procedure permitting withholding did not violate due process. The Pennsylvania law did not give employees an unconditional right to payment for medical treatments, but rather made payment conditional on

the employee "establish[ing]" that the treatment was "reasonable and necessary." *Id.* at 60-61. Accordingly, the Court held, employees who are temporarily denied payment pending an inquiry into reasonableness and necessity were not deprived of anything in which they had a protected property interest.

This Court then granted a petition for a writ of certiorari in this case, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *Sullivan*. 526 U.S. 1061 (1999). On remand, the court of appeals reinstated its judgment and opinion, declaring that this Court's *Sullivan* decision was "fully consistent" with its analysis. Pet. App. A3. With regard to state action, the court noted that *Sullivan*'s holding pertained to actions "carried out by a private insurer exercising its discretion in a way permitted by State law." *Id.* at A6. In this case, the court stated, the withholding of money was "specifically directed by State officials in an environment where the withholding party has no discretion at all," and respondent's complaint had "directly attack[ed] the notices of withholding issued by the state agency." *Id.* at A6-A7.

The court of appeals also distinguished *Sullivan*'s due process analysis. The court of appeals declared that its prior opinion in fact was predicated on a theory that this Court had "preserved" in footnote 13 of *Sullivan*. In that footnote, the Court declined to address (as waived) the argument that employees might have "a property interest in their claims for payment, as distinct from the payments themselves," such that the State might be precluded from "finally reject[ing] their claims without affording them appropriate procedural protections." 526 U.S. at 61 n.13. In this case, the court of appeals stated, respondent had a property right in its "claim for payment." Pet. App. A5-A6; see *id.* at A6 (respondent does "not have a right to payment of the disputed funds pending the outcome of whatever kind of hearing would be afforded"). There was a due process violation

here, the court declared, not because respondent was denied immediate payment, but because "the California statutory scheme afforded no hearing at all when state officials directed that payments be withheld." *Ibid.*

Judge Kozinski dissented again, finding the majority's new opinion irreconcilable with *Sullivan*. Pet. App. A7-A13. Under *Sullivan*, Judge Kozinski maintained, there is no state action here, because the California Labor Code leaves prime contractors "free to pay [respondent] the full amount specified by the contract," even if the contracting agency withholds payments from the prime contractor. *Id.* at A8. *Sullivan*, in his view, also precludes respondent from claiming a property interest. Just as Pennsylvania employees could have no property interest in payment for treatments not yet shown to have been "reasonable" and "necessary," respondent in this case could have no protected property interest in payment for work not shown to have satisfied "the contractual condition that it be completed in accordance with prevailing wage requirements." *Id.* at A11.

Judge Kozinski also rejected the majority's reliance on the proposition that respondent had been deprived of a protected property interest in its claims for payment, as distinct from the payments themselves. Even if respondent had a property interest in claims for payment, he explained, the majority's judgment amounted to "premature remediation," because respondent had not been finally deprived of any such claim. Pet. App. A11. The reason such claims had not been adjudicated, Judge Kozinski noted, is that respondent had not attempted to assert them. Until such time as it was clear that respondent could exercise none of several possible options, he stated, "it simply cannot be said that the state has 'finally reject[ed]'" respondent's "claims without affording [it] appropriate procedural protections." *Id.* at A13.

SUMMARY OF ARGUMENT

I. A. Respondent has no constitutionally protected property interest in payment under its public works contracts. California's Labor Code makes it clear that a condition to respondent's right to full payment is compliance with all contractual requirements, including payment of the prevailing wage; that, in cases of dispute, payment will be withheld pending a resolution; and that, in such cases, respondent has the burden of proving compliance. In this case, respondent has not yet shown that it complied with the prevailing-wage requirement. As a result, its right to full payment under its contracts has yet to attach, and the withholding of payments does not deprive respondent of anything to which it is entitled.

Ordinary contract principles lead to the same result. In continuing contracts, performance by one party is a constructive condition of the other party's obligation to pay. In this case, respondent voluntarily entered into an agreement that, among other things, required it to pay prevailing wages and prove its compliance if a dispute arose. Because respondent's performance in conformity with those terms is a constructive condition of the obligation to pay, neither the State's asserted payment obligation nor respondent's asserted right to payment has yet attached. Indeed, as a historical matter, parties claiming a right to payment on a contract have been remitted to a lawsuit—a breach-of-contract action—in which they must prove entitlement to payment. No more process is due simply because one party to the contract is the government.

Respondent, moreover, effectively is seeking to prevent the State from exercising its bargained-for contractual self-help right to withhold payments from prime contractors for breach of the prevailing-wage requirement, simply because prime contractors might, in turn, withhold payments from subcontractors like respondent. Nothing in the Constitution

precludes a State from bargaining for and obtaining in its commercial contracts the same sort of payment withholding rights that private parties may include in their contracts. Nor is the State's right to enforce such contract conditions limited when it establishes them by statute. Those who find the terms demanded by the State undesirable are free to avoid contracting with the State, or to demand greater compensation as the price of agreement.

B. Respondent likewise has not been deprived of a property interest in a "claim" for payment. Respondent has not submitted a claim and had it rejected; respondent instead never submitted a claim of any variety. As a result, it is difficult to conclude that respondent has suffered a deprivation of any claim it may have. Indeed, although the Ninth Circuit decided that California provides no mechanism through which respondent can assert its alleged claim for payment, respondent may well be able to present any such claim through state processes and, upon proving compliance, convert it into a right to payment.

In any event, to the extent the scope of available remedies under California law is unclear, declaratory and injunctive relief was inappropriate. This Court repeatedly has emphasized that federal courts should not decide federal constitutional questions that depend on uncertain forecasts regarding the meaning of state law. Abstention or certification to the state supreme court would have been appropriate in these circumstances; deciding the case based on questionable assumptions about California law was not.

II. In addition to showing deprivation of a property interest, respondent must show that the deprivation was fairly attributable to the State. To the extent California law leaves decisions on whether to withhold payments from a subcontractor to the business discretion of the prime contractor, respondent cannot show state action. The fact that the State has authorized private parties to employ traditional self-help remedies like withholding disputed payments does not

convert the essentially private exercise of that right into state action. To the extent the State compels prime contractors to withhold payments from subcontractors, however, state action is present.

ARGUMENT

I. RESPONDENT HAS NOT ESTABLISHED A VIOLATION OF ITS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS

Because the "requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property," *Board of Regents* v. *Roth*, 408 U.S. 564, 569 (1972), the "first inquiry in every due process challenge is whether" the interest asserted by the plaintiff, and that was allegedly subject to deprivation, constitutes "a protected interest in 'property' or 'liberty'" within the meaning of the Due Process Clause. *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 59 (1999). The court of appeals identified two different property interests here—first, respondent's supposed right to full payment under its contracts, and second, its "claim" for full payment. As to the first, respondent has no present property interest. As to the second, respondent has not established a deprivation.

A. Respondent Has No Constitutionally Protected Property Interest In Full Payment Under Its Public Works Contracts

Consistent with the allegations in respondents' complaint, the court of appeals initially concluded that respondent had a "property interest in being *paid in full* for the construction work it ha[d] completed," declaring that such an interest "ar[ose] from [respondent's] public works contract." Pet. App. A30 (emphasis added). See *id.* at A98 (complaint's allegation that respondent was "deprived of property in the form of substantial sums of money" under its contracts).

That conclusion is impossible to reconcile with the relevant California statutes, is contradicted by respondent's contracts, and is inconsistent with general contract principles.

1. In *Sullivan*, this Court considered whether Pennsylvania's workers' compensation statute created a Fourteenth Amendment "property interest" in payment for the treatment of work-related injuries. 526 U.S. at 44. Under that law, employers and their insurers were required to pay —and employees were correspondingly entitled to payment for—the cost of reasonable and necessary treatments for such injuries. *Ibid.* Pennsylvania law, however, provided that insurers wishing to dispute the reasonableness or necessity of treatments (and thus their obligation to pay) could request review by a utilization review organization, and withhold payment pending that review. See *id.* at 45-46. The plaintiffs in *Sullivan* argued that permitting such withholding of payment denied the employees, without due process, a state-created property interest in payment for the treatment of their work-related injuries. *Id.* at 59-60.

This Court rejected that argument. The Pennsylvania law not only conditioned the plaintiffs' right to payment on "reasonableness" and "necessity," but also expressly provided that, in disputed cases, reasonableness and necessity had to be established before the insurer's payment obligation would attach. 526 U.S. at 58-61. The Court explained:

> Under Pennsylvania law, an employee is not entitled to payment for *all* medical treatment once the employer's initial liability is established * * *. Instead, the law expressly limits an employee's entitlement to "reasonable" and "necessary" medical treatment, and requires that disputes over the reasonableness and necessity of particular treatment must be resolved *before* an employer's obligation to pay—and an employee's entitlement to benefits—arise. * * * Thus, for an employee's property interest in the payment of medical benefits to attach under state law, the employee must clear two hurdles: First, he must prove that an employer is liable for a work-related injury, and second, he must establish that the particular medical treatment at issue is reasonable and necessary.

Id. at 60-61. The Court concluded that, because the plaintiffs in *Sullivan* had yet to clear the second hurdle—"to make good on their claim that the particular medical treatment they received was reasonable and necessary"—they lacked "a property interest in" payment and could not assert a due process claim for the deprivation thereof. *Id.* at 61.

The California laws at issue in this case similarly make it clear that respondent has no unconditional entitlement to full payment. California law generally makes full performance of all material obligations on a public works project, including compliance with prevailing-wage requirements, a condition precedent to the right to receive full payment. See, *e.g.*, Cal. Pub. Cont. Code §§ 7107(c), 9203 (West Supp. 2000); Cal. Lab. Code § 1775(b)(4) (West Supp. 2000) (before "making final payment to the subcontractor * * * the contractor shall obtain an affidavit * * * from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages"). And California law provides that, if the contracting body or the State concludes that the prevailing-wage requirement has not been met, then "*[b]efore* making payments to the contractor," the contracting body "shall withhold and retain" from any such payments the amount by which workers have been underpaid and any penalties. Cal. Lab. Code § 1727 (emphasis added). California law further provides that, if the State withholds payment from a prime contractor because of a subcontractor's failure to pay prevailing wages, the prime contractor is authorized, *before* making payment, "to withhold from [the] subcontractor under him sufficient sums to cover any penalties withheld from him * * * on account of the subcontractor's

failure to comply." *Id.* § 1729. Finally, California law provides that, if the contractor (or its assignee) wishes to contest the withholding, it must bring a breach of contract action, and that it bears the burden in that action of proving full compliance and thus "establish[ing] [its] right to the wages or penalties withheld." *Id.* § 1733.

Thus, just as the employees in *Sullivan* were not entitled to full payment for the medical treatments unless they were "reasonable" and "necessary," 526 U.S. at 61, respondent is not entitled to full payment on its subcontracts unless it fully complies with California's prevailing-wage requirement. Just as the Pennsylvania law in *Sullivan* "require[d] that disputes over the reasonableness or necessity of particular treatment * * * be resolved *before* an employer's obligation to pay—and an employee's entitlement to benefits—ar[o]se," *ibid.*, so too California law requires that disputes over respondents' compliance with the prevailing-wage law be resolved *before* the contracting body's and the prime contractor's obligations to pay (and thus respondent's right to be paid) arise. And, just as the employees in *Sullivan* had yet to prove their entitlement by establishing reasonableness and necessity, respondent here has yet to make good on its claim that it complied with the prevailing-wage law that is a condition to final payment. See Pet. App. A11 (Kozinski, J., dissenting).

2. Respondent in any event does not contend that California statutory law provides it with a property interest in full payment. Instead, respondent contends—and the Ninth Circuit in its now-reinstated pre-*Sullivan* opinion held—that respondent's *contracts* with prime contractors provided respondent with a property interest. See Pet. App. A30 (respondent's "interest arises from its public works contract"). But neither respondent nor the court of appeals identified the relevant contractual provisions giving rise to that alleged property right. It is difficult to see how respondent could claim (and the Ninth Circuit could find) the deprivation of a property right arising from a contract without reference to the terms and conditions of the contract itself.

Besides, it is well established that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 20 n.17 (1977) (quoting *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 429-430 (1934), and *Von Hoffman* v. *City of Quincy*, 71 U.S. (4 Wall.) 535, 550 (1867)).[3] Consequently, as a matter of law, the relevant portions of California's labor statutes are part of respondent's contracts. And as explained above, those statutes preclude respondent from claiming an unqualified right to full and final payment from the prime contractor, since they make respondent's compliance with the prevailing-wage law a condition precedent to its right to receive full payment, and authorize the withholding of payment in disputed cases until respondent has established entitlement. Moreover, in this case, the Ninth Circuit did not disagree with petitioners' contention that "the withholding procedure" respondent challenges as depriving it of property "is contained in" respondent's subcontracts, Pet. App. A31, and it noted respondent's "conce[ssion] that the express terms of the contract grant the state the authority to withhold funds for wage violations," *id.* at A32.[4] Surely respondent cannot claim that it has a

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[3] See also *Ogden* v. *Saunders*, 25 U.S. (12 Wheat.) 213, 259-260, 297-298 (1827) (opinions of Washington and Thompson, JJ.). That principle is well accepted both as a matter of standard contract law, 11 R. Lord, *Williston on Contracts* § 30:19, at 203-204 (4th ed. 1999), and as a matter of California law, *City of Torrance* v. *Workers' Compensation Appeals Bd.*, 185 Cal. Rptr. 645, 648 (1982).

[4] See Pet. App. A32 (withholding provisions "incorporated by state law into all public works contracts"); *id.* at A22 (Sections 1771, 1727, 1729, and 1775 "must be incorporated into all public works contracts"). See also Cal. Lab. Code § 1775(b)(1) (West. Supp. 2000) (for prime contractor to avoid penalties for subcontractor's failure to pay prevailing wage, it must

protected property right to full payment under its contracts where those very contracts permit prime contractors to withhold the payments; as in *Sullivan*, "[t]o state the argument is to refute it." 526 U.S. at 61.

3. Respondent's claim that it has a protected property right in payment under its subcontracts, moreover, cannot be reconciled with general principles of contract law. It is by now well settled that one party's fulfillment of its obligations under a contract is a constructive condition of the other party's obligation to pay. See *Restatement (Second) of Contracts* § 237 cmt. a (1979) ("[A] material failure of performance * * * operates as the non-occurrence of condition" and thus "prevent[s]" the corresponding "performance" of the other party "from becoming due, at least temporarily."); 3A A. Corbin, *Corbin on Contracts* § 708, at 333 (1960) ("If the refusal to pay an installment is justified" by the failure of substantial performance, the unpaid party cannot declare breach.).[5] In this case, after respondent voluntarily agreed to a contract term requiring it to "pay a prevailing wage to [its] employees," the State "determined that [respondent] did not comply with its prevailing wage obligation, and thus withheld payments." Pet. App. A49 (Kozinski, J., dissenting). Because respondent's performance in conformity with

comply with requirement that "[t]he contract executed between the contractor and the subcontractor for the performance of work * * * shall include a copy of the provisions of Sections 1771, 1775, 1776, [and] 1777.5").

[5] This rule repeatedly has been applied in the context of progress payments on construction contracts. See, *e.g.*, *Howard S. Lease Constr. Co.* v. *Holly*, 725 P.2d 712 (Alaska 1986) (contractor entitled to withhold amount of back charge for fine grading, which had been contractual obligation of subcontractor, from progress payments); *Morgan* v. *Singley*, 560 S.W.2d 746 (Tex. Civ. App. 1977) (affirming finding that defective performance of subcontractor justified withholding of payment); *Bart Arconti & Sons, Inc.* v. *Ames-Ennis, Inc.*, 340 A.2d 225 (Md. 1975) (affirming finding that withholding was justified where subcontractor breached contract); *K & G Constr. Co.* v. *Harris*, 164 A.2d 451 (Md. 1960) (subcontractor's negligent operation of heavy equipment a material breach justifying suspension of progress payments).

that term (and in cases of dispute, proof of performance) was a constructive condition of the obligation to pay, the withholding did not deny respondent a property right guaranteed by the contract. See *Sullivan*, 526 U.S. at 57 (noting traditional rule that, although one can "become liable * * * if the refusal to pay breached the contract," the "obligation to pay would only arise after" the claimant had "initiated a claim and reduced it to a judgment").

In that respect, the State's withholding of payment here is "no different from a builder's refusal to make progress payments" on any other commercial construction contract "when he discovers (or believes he has discovered) a failure of performance on any other term." Pet. App. A49 (Kozinski, J., dissenting). Where a private builder refuses to pay because of an alleged breach, the party claiming injury is generally remitted to a lawsuit, in which it must prove performance and entitlement to payment. We see no reason why the Constitution should forbid a similar approach in the context of voluntarily undertaken commercial construction contracts, like those at issue here, merely because they concern public works.[6]

4. For the same reasons, even if there were a constitutionally protected interest in payment, there is no due process violation so long as the State provides some form of post-deprivation process, in the form of a breach of contract action or otherwise. At common law, the only remedy for

[6] Because respondent's entitlement to payment has not been legally established, the court of appeals' reliance (Pet. App. A30) on *Sniadach* v. *Family Fin. Corp.*, 395 U.S. 337 (1969), was misplaced. In *Sniadach*, the State permitted third-party creditors to garnish employee wages. Because the employee had already become entitled to payment from the employer—garnishment effectively intercepts payments that not only have been earned by the employee, but that the employer in fact is making to the employee—the procedure did deprive the employee of a present property interest in payment. Here, in contrast, respondent has not established entitlement to payment under its contracts, and it is for that very reason that the payor itself has chosen to withhold payment.

breach of contractual obligations was a suit for monetary compensation, 3 E.A. Farnsworth, *Farnsworth on Contracts* § 12.4, at 159 (1990), and the suit for such a judgment is still "usually regarded as adequate to satisfy the requirements of justice," 5A A. Corbin, *supra*, § 1139, at 111 (1964). Thus, courts generally will not grant other relief for breach of contract if a suit for monetary relief is adequate. See *Restatement (Second) of Contracts*, *supra*, § 359. See also *United States* v. *Winstar Corp.*, 518 U.S. 839, 885 (1996) (opinion of Souter, J.) ("[D]amages are always the default remedy for breach of contract."); *Thompson* v. *Railroad Cos.*, 73 U.S. (6 Wall.) 134, 137 (1867) (suit in equity barred where "an action at law * * * to recover damages for a breach of contract" would have permitted "the railroad companies to collect their debt"). Thus, even in clear cases of breaches of contractual rights, historical practice has been to remit the party claiming breach to a suit seeking compensation after the fact. There is no reason why the Constitution should require any more process for parties who voluntarily enter into a commercial contract with the government. Thus, for example, Congress—although providing a specialized forum and waiver of immunity for breach-of-contract suits against the United States under the Tucker Act, 28 U.S.C. 1346, 1491—still largely precludes relief other than monetary compensation after a breach has occurred. See *United States* v. *Testan*, 424 U.S. 392, 397-398 (1976); *United States* v. *Alire*, 73 U.S. (6 Wall.) 573, 575-577 (1867).[7]

That rule is especially sound here, since respondent does not so much seek to prevent the State from breaching a contractual obligation as it attempts to preclude the State from exercising its own bargained-for contract rights. When

[7] Indeed, before the Tucker Act, a contractor seeking to recover on a breach-of-contract claim against the United States had no automatic right to a judicial forum, and was remitted instead to seeking a private bill. See *OPM* v. *Richmond*, 496 U.S. 414, 430-431 (1990).

prime contractors enter into public works projects in California, they undertake an obligation to ensure that all workers on the project are paid the prevailing wage. See Cal. Lab. Code §§ 1771, 1774. Thus, when project employees are not paid that wage—whether the employees are the prime contractor's or those of its subcontractor—the prime contractor is contractually obligated to pay them the difference itself. See *id.* § 1775 (West 1989) ("The difference between the prevailing wage rates and the amount paid to each worker * * * shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.") (pre-1998 statute); *id.* § 1775(a) (West Supp. 2000) (same, but payment must be made by prime contractor or subcontractor); *id.* § 1775(d) (West Supp. 2000) (prime contractor jointly and severally liable for nonpayment). And, if the prime contractor fails to do so, the State has a right to withhold payment to the prime contractor on account of that breach. See *id.* §§ 1727, 1775. We fail to see how the State's enforcement of its bargained-for contractual right—to withhold payment on account of the prime contractor's breach of an obligation to ensure that *all* project employees are paid the prevailing wage—could conceivably violate the subcontractor's constitutional rights.

Perhaps recognizing as much, the Ninth Circuit attempted to recharacterize this suit as a challenge to the State's exercise of its "regulatory power," because California law mandates inclusion of the prevailing-wage requirement and the withholding provisions in all of the State's public works contracts. Pet. App. A32. But the fact that the State has statutorily established the terms on which it is willing to enter into commercial contracts for public works (rather than leaving the terms to the discretion of individual state contracting bodies) does not make a constitutional difference. Private parties too may declare in advance certain contract conditions that are not subject to negotiation. In

either event, those who find the required conditions undesirable can decline to contract or insist on greater compensation. *Id.* at A49, A51 (Kozinski J., dissenting). As this Court explained in upholding a similar statutory scheme almost a century ago, "we can imagine no possible ground to dispute the power of the State to declare that no one undertaking work *for it*" must undertake particular obligations, for it is not "part of the liberty of any contractor that *he* be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the State." *Atkin* v. *Kansas*, 191 U.S. 207, 222 (1903). Instead, each State has the unquestioned power "to prescribe the conditions upon which it will permit public work to be done on its behalf * * *. No court has authority to review its action in that respect." *Id.* at 222-223. Accord *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940) ("Like private individuals and businesses, the Government enjoys the unrestricted power * * * to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."). In this case, respondent voluntarily chose to enter into a contract containing the terms and conditions the State requires for all public works contracts. Having done so, respondent cannot complain that it has been deprived of a contract-based property right to full payment where the contract itself simply does not provide that right.[8]

[8] This case does not implicate the Court's previous rejection of the principle that, "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant * * * must take the bitter with the sweet" for due process purposes. *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 540 (1985) (quoting *Arnett* v. *Kennedy*, 416 U.S. 134, 153-154 (1974) (plurality opinion)). For one thing, this case does not involve the distribution of entitlements or statutory benefits, nor the provision of state jobs to individuals; instead, it concerns construction contracts for public works, an area in which the State traditionally has had greater discretion to establish the terms under which it is willing to do business. See *Atkin*, *supra*; *Lukens Steel*, *supra*.

More fundamentally, recognizing that a property interest in actual receipt of a payment does not "attach under state law," *Sullivan*, 526 U.S. at 60, until the claimant's entitlement thereto has been determined through State-specified procedures is not an invocation of the bitter-with-the-sweet principle. In *Sullivan*, this Court recognized that no property interest in the receipt of even a statutory benefit can arise until the claimant's entitlement to the benefit has been established. *Id.* at 60-61. Before the State has satisfied itself of an individual's entitlement to a benefit, the individual has at most a mere "unilateral expectation" of receiving it, which does not constitute "property." *Roth*, 408 U.S. at 577. By contrast, an individual's expectation of *continued* receipt of a benefit to which the State has already found him or her entitled may constitute a reasonable, non-unilateral reliance interest of the sort "upon which people rely in their daily lives," and which "[i]t is a purpose of the ancient institution of property to protect." *Ibid.* See also *Sullivan*, 526 U.S. at 60 (respondents' property interest was "fundamentally different" from those involved in cases in which the individuals' "entitlement to benefits had been established," and which involved the procedures necessary in connection with terminating the "*continued* payment of benefits"); *Gilbert* v. *Homar*, 520 U.S. 924, 928 (1997). In this case, standard contract principles condition respondent's right to receive full payment on its full performance; because respondent failed to perform as required, its right to receive the corresponding full payment never matured.

B. The State Has Not Deprived Respondent Of Any Property Interest In Claims For Withheld Payments

Following this Court's grant, vacatur, and remand of the Ninth Circuit's initial decision in light of *Sullivan*, see pp. 6-7, *supra*, the Ninth Circuit identified a different property interest. Although the Ninth Circuit reinstated its earlier opinion, it acknowledged that respondent does not "have a right to payment of the disputed funds pending the outcome of whatever kind of hearing would be afforded to determine whether [respondent] complied with the California prevailing wage laws." Pet. App. A6. But it concluded that respondent had a property interest in a "claim" for payment. *Ibid.* The Ninth Circuit explained that this Court, in *Sullivan*, 526 U.S. at 61 n.13, had reserved judgment on whether plaintiffs could have a property interest in their claims for

benefits, as distinguished from the benefits themselves, "such that the State, the argument goes, could not finally reject their claims without affording them appropriate procedural protections."

1. As we explained in our brief as amicus curiae in *Sullivan* (97-2000 U.S. Br. at 21-22), an individual who has applied for statutory benefits, but who has not yet received a determination of entitlement, may well enjoy a constitutionally protected property interest in his or her *claim* for benefits (so long as the statute providing the benefits remains in effect), even though he or she has no protected interest in the immediate receipt of the benefits themselves. Such a claim for payment is akin to a "chose in action," which may be a species of property. See, *e.g.*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982); see *Shvartsman* v. *Apfel*, 138 F.3d 1196, 1199 (7th Cir. 1998) (discussing *Zimmerman*). Thus, state action bringing about the final and irrevocable denial of the claim for the benefit—as distinguished from regulating the individual's access to the benefit in a manner that does not destroy the value of the claim altogether—is subject to due process scrutiny.

We do not believe, however, that invocation of such a property interest supports the Ninth Circuit's judgment here. This is not a case in which a party actually filed a claim of some variety—or a lawsuit—only to have it rejected arbitrarily or adjudicated through unfair procedures. Pet. App. A11 (Kozinski, J., dissenting) (contrasting *Logan*, 455 U.S. 422). Instead, respondent has yet to file a claim of any variety; nor has respondent established the absence of a practicable forum to which such a claim could be submitted. Under these circumstances, it cannot be said that the State has deprived respondent of a "claim" for payment.

The Ninth Circuit appears to have assumed that respondent need not submit a claim for payment through state processes because California has not provided a mechanism by which such claims may be adjudicated. But Section 1733

of the California Labor Code provides a specialized breach-of-contract action through which the prime "contractor *or [its] assignee*" may challenge withholding and obtain funds mistakenly withheld. Cal. Lab. Code § 1733 (emphasis added). Respondent nowhere alleges that it sought an assignment from the prime contractor to permit it to bring suit under Section 1733. Pet. App. A12-A13 (Kozinski, J., dissenting). Nor does respondent explain why a prime contractor that withheld payments from its subcontractor would resist such an assignment.[9] Indeed, respondent nowhere claims that such assignments are difficult to obtain, or that respondent cannot protect itself from the prospect of a refusal to assign by requiring assignment as a condition of its contracts. Finally, it is far from clear that state courts would refuse to require an express assignment in the event that a prime contractor unreasonably refused to assign the right, or effect an "equitable assignment" through the doctrine of subrogation.[10] It is difficult to credit the contention that respondent's purported "claim" for payment has been unlawfully extinguished when respondent does not allege that it has made any effort to assert it.

Moreover, the Ninth Circuit assumed—without citation to California case law—that Section 1732 makes Section 1733

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[9] Respondent observes that a prime contractor subjected to withholding that has in turn withheld payments from a subcontractor "has no financial incentive to contest the" State's "action." Br. in Opp. 16. By the same token, however, such a prime contractor loses nothing by assigning the right to sue to its subcontractor, and presumably would be willing to do so in order to preserve its relationship with its contracting partner, as well as its reputation in the industry, and to avoid the prospect of a breach-of-contract action for unreasonably withholding assignment (see p. 23, *supra*) or for failing to make final payment (see p. 24 & note 12, *infra*).

[10] Federal courts could not effect such an equitable assignment of rights against the federal government under the Tucker Act. The Tucker Act strictly limits the causes of action that may be brought, and subrogation suits are not among those listed. See, *e.g.*, *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255 (1999).

the exclusive remedy for any person seeking to challenge withholding. Pet. App. A22. But Section 1732 makes suit under Section 1733 "the exclusive remedy *of the [prime] contractor or [its] assignees*," Cal. Lab. Code § 1732 (emphasis added), and thus does not, by its terms, preclude suit by a subcontractor that has not obtained an assignment of the prime contractor's rights. See *J & K Painting Co.* v. *Bradshaw*, 53 Cal. Rptr. 2d 496, 500 (Ct. App. 1996). For that very reason, at least one California appellate court has permitted a subcontractor to bring a challenge through a writ of mandate under Cal. Civ. Proc. Code § 1085. *J & K Painting Co.*, 53 Cal. Rptr. 2d at 499-501.[11] Finally, the Ninth Circuit's conclusion that the Labor Code would preclude the subcontractor from bringing a common-law breach-of-contract action against the prime contractor (Pet. App. A28, A37 n.9) is not a self-evidently correct reading of California law.[12] Thus, given the general reluctance of California courts to read legislation as providing only a "patently inadequate" remedy, *J & K Painting*, 53 Cal. Rptr. 2d at 501 n.7, there is reason to doubt that respondent lacks any mechanisms through which it may assert a "claim" for payment.

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[11] As the petition explains (at 6), a subcontractor also could seek to recover withheld payments under California's statutory "stop notice" procedure. See Cal. Civ. Code § 3210 (West 1993); *Department of Indus. Relations* v. *Fidelity Roof Co.*, 70 Cal. Rptr. 2d 465, 470 (Ct. App. 1997).

[12] The Ninth Circuit read Section 1729 of the California Labor Code as providing prime contractors with an absolute defense against such actions. Pet. App. A28, A37 n.9. By its terms, however, Section 1729 makes it "lawful" for a prime contractor to withhold payments from a subcontractor where sums have been "withheld from [the prime contractor] by the awarding body *on account of the subcontractor's failure to comply*" with prevailing-wage requirements. Where the subcontractor in fact has complied with those requirements, withholding by the State could be regarded as not "on account of the *subcontractor's failure* to comply," but rather on account of the *State's mistake* regarding compliance, and the prime contractor's failure—by neither challenging the error itself nor assigning the right to do so—to seek a correction.

For present purposes, however, it is sufficient to note that the burden is on respondent to establish a violation of its due process rights, and that respondent has failed to carry that burden. Simply put, any violation of respondent's rights would not be complete until the State has both deprived respondent of its interest in "property," and the process that is respondent's due has been denied. Cf. *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 193-195 (1985). Here, respondent cannot argue that either has occurred with respect to its purported property interest in a claim for payment. There has been no deprivation of any such interest because the claim has yet to be asserted in any state forum, much less rejected or terminated by the State. And, although state law in this area is not certain, respondent may well be able to present its claim through state processes and, upon proving compliance, convert that claim into the payment that is its ultimate goal. Only if respondent makes an effort to do so and is rebuffed, or has affirmatively established that no procedure is available, will it be possible to conclude with assurance that respondent has been deprived of any claim for payment it may have, and that any such deprivation occurred without the process that is constitutionally due. That respondent has not done.

2. There is an additional infirmity in the court of appeals' reliance on suppositions regarding California law to invalidate this important statutory scheme. As this Court explained over half a century ago, "important considerations of policy in the administration of federal equity jurisdiction" weigh against federal court relief against state action on constitutional grounds where the ultimate holding rests on a "forecast" as to how state courts would resolve particular questions of state law. *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496, 499-501 (1941). Indeed, this Court repeatedly has relied on the strong federal interests in avoiding "unnecessary friction" in federal-state relations, preventing interference with "important state functions," and avoiding both

"tentative decisions on questions of state law" and "premature constitutional adjudication" as grounds for refusing federal decision on constitutional questions where the state laws in question are "fairly subject to an interpretation which w[ould] render unnecessary or substantially modify the federal constitutional question." *Harman* v. *Forssenius*, 380 U.S. 528, 534, 535 (1965). See, *e.g.*, *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 305-312 (1979); *Lake Carriers' Ass'n* v. *MacMullan*, 406 U.S. 498, 510-513 (1972).

To the extent state law regarding the availability of remedies is unclear, this is precisely the sort of case in which *Pullman* abstention is appropriate, since any decision invalidating California's statutory scheme would necessarily rest on the questionable "forecast" that no state remedies exist. The court of appeals in this case nonetheless invalidated a prevailing wage enforcement scheme that has been in place in California for over 60 years. In so doing, the court took at face value respondent's assertions as to the meaning of the California Labor Code §§ 1729, 1732, and 1733, see Pet. App. A22, A28, A37 n.9; relied on the very *absence* of controlling judicial precedent as a basis for concluding that respondent had no available remedies under state law, see *id.* at A37 n.9; and disregarded the position of the state agency responsible for enforcing the Labor Code that other remedies were available. See generally pp. 22-24 & notes 11-12, *supra*. This Court itself has abstained in such circumstances. See *Carey* v. *Sugar*, 425 U.S. 73 (1976) (per curiam) (abstaining in procedural due process challenge to state prejudgment attachment statute, noting that injunctive relief was "particularly inappropriate" in light of state officials' claim that state law made available procedures of the sort the plaintiffs demanded).

Nor did the court of appeals consider the ordinary alternative to *Pullman* abstention, which is certification of the relevant state law questions to the state supreme court. See California Rules of Court 29.5(a); *Arizonans For Official*

English v. *Arizona*, 520 U.S. 43, 76 (1997). Invocation of that procedure would have been superior to premature adjudication of a federal constitutional question (and invalidation of an important state statute) based on what may have been an inappropriately parsimonious construction of the relevant state laws. Moreover, we note that California has recently revised its Labor Code, effective July 1, 2001, to add a new Section 1742, which entitles both prime contractors and subcontractors to challenge a notice of assessment of unpaid wages through administrative proceedings, with a right of judicial review. See p. 4, *supra*. That new provision will eliminate (as of its imminent effective date) any basis for the court of appeals' belief that a subcontractor like respondent has no means of challenging the State's withholding of payments from a prime contractor, where the prime contractor in turn withholds payments from the subcontractor.

For the foregoing reasons, if this Court does not reverse the judgment of the court of appeals, it may wish to consider vacating that court's judgment and remanding with directions to dismiss the case, in view of the absence of any significant continuing justification for an award of prospective equitable relief, and the presence of uncertain questions of state law that would otherwise appear to call either for *Pullman* abstention or for a certification to the California Supreme Court that probably could not be completed before the new law becomes effective on July 1, 2001.

II. THE COURT OF APPEALS' STATE ACTION ANALYSIS IS UNPERSUASIVE

In order to state a claim for the deprivation of a right protected by the Fourteenth Amendment, respondent must establish "state action" implicating the due process guarantee. *Sullivan*, 526 U.S. at 49-50. Respondent's primary contention is that it suffers injury when prime contractors withhold final payments from respondent under its public works contracts. According to petitioners, however, Section

1729 of the California Labor Code permits but does not compel prime contractors to withhold those payments; prime contractors, petitioners therefore argue, are not properly characterized as "state actors." To the extent that description of prime contractors' discretion is correct, we agree. As this Court explained in *Sullivan*, the fact that the State has authorized private parties (like the prime contractors here) to employ traditional self-help remedies (such as withholding disputed payments) "without participation by any public official" does not itself convert essentially private conduct into state action. 526 U.S. at 57 (quoting *Flagg Bros.* v. *Brooks*, 436 U.S. 149, 162 n.12 (1978)). Nor do we think that *Sullivan* can be meaningfully distinguished on the ground that, in this case, respondent has sued only state officials, and has challenged their withholding of payments from the prime contractor in the first instance. The conduct of state officials did not injure respondent; the prime contractor's independent decision to withhold payments from respondent did. At least so long as the prime contractor was free to pay respondent notwithstanding the State's action of withholding payment (as the prime contractor might do to ensure respondent's continued performance despite a breach), and so long as the prime contractor was free to withhold payments even if the State did not do so first (as the prime contractor might do in the event of breach), respondent's injury would appear to be properly attributed to the prime contractor's business judgment, not to action of the State. Cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (standing requires the injury to be "fairly traceable" to the defendant's conduct rather than to "independent action of some third party not before the court").

We likewise do not agree with the court of appeals' conclusion that state action exists here because respondent was the "target of the state's action" of withholding payment from prime contractors. Pet. App. A67. Although this Court has left open the possibility that state action could be

established by a plaintiff who is indirectly affected when the government "act[s] against" a third party "for the purpose of punishing or restraining" the plaintiff, *O'Bannon* v. *Town Court Nursing Ctr.*, 447 U.S. 773, 789 n.22 (1980), the operation of Section 1729 does not depend on such a purpose. The State's withholding of payment from the prime contractor is justified by—and designed to redress—the prime contractor's breach of its *own* obligation to ensure that its subcontractors comply; and the State's withholding also serves to isolate project funds that can be used to compensate the underpaid workers on the project, without regard to whether those funds are withheld in the end only from the prime contractor or whether the prime contractor in turn withholds payments from the subcontractor. See Cal. Lab. Code § 1775(b)(2) (West Supp. 2000) (prime contractor obligated to monitor subcontractor's compliance with prevailing wage law); *id.* § 1775(d) (withheld funds paid to undercompensated workers); p. 19, *supra* (prime contractor's obligation to ensure payment).

Nonetheless, there are two provisions of the California Labor Code that might now support a finding of state action. Although Section 1729 of the Labor Code does not require prime contractors to withhold payments from subcontractors —and nothing in the pre-1998 version of the California Labor Code appears to have done so either—an amendment to Section 1775 of that Code, effective January 1, 1998, suggests that California law in fact may *require* prime contractors to withhold payments from subcontractors under certain circumstances. In particular, the currently effective Section 1775(b)(3) of the Labor Code states that, when a contractor becomes aware of a subcontractor's failure to comply with prevailing-wage requirements, "the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, *retaining sufficient funds due the subcontractor* for work performed on the public works project." Cal. Lab. Code 1775(b)(3) (West Supp. 2000) (em-

phasis added). In addition, a new Section 1775(c) provides that, if a subcontractor has not paid the prevailing wage and the contracting agency does not retain sufficient funds to pay those employees the balance of their wages, "the contractor *shall* withhold" from the subcontractor "an amount * * * sufficient to pay those employees the general prevailing rate * * * *if requested* by the Division of Labor Standards Enforcement." *Id.* § 1775(c) (emphasis added). To the extent those provisions are at issue here and compel prime contractors to withhold payments once the State notifies the prime contractor of a subcontractor's noncompliance, we believe that state action is present. As this Court has explained, a State can be held responsible for a private decision when it "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Sullivan*, 526 U.S. at 52 (quoting *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982)).

CONCLUSION

The judgment of the court of appeals should be reversed. In the alternative, the Court may wish to vacate the judgment of the court of appeals and remand the case with directions to vacate the judgment of the district court and remand the case to that court with directions to dismiss the complaint for want of a basis for prospective equitable relief in light of the enactment of 2000 Cal. Legis. Serv. Ch. 954 (A.B. 1646) (West), and the presence of uncertain questions of state law.

Respectfully submitted.

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Supreme Court of the United States

ARTHUR S. LUJAN, *et al.*,

Petitioners,

vs.

G&G FIRE SPRINKLERS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE THE PORT OF OAKLAND AND 54 CALIFORNIA CITIES IN SUPPORT OF PETITIONERS

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BRIEF OF AMICI CURIAE THE PORT OF OAKLAND AND 54 CALIFORNIA CITIES IN SUPPORT OF PETITIONERS

The Port of Oakland and the 54 cities as listed on Attachment A ("Amici") submit this brief of amici curiae in support of petitioners Victoria Bradshaw, et al.

STATEMENT OF AMICI CURIAE

A. Identity of Amici

Amici are 54 California public entities responsible for building and maintaining roads, bridges, buildings, harbors and airports for use by the public. In fulfilling these responsibilities, Amici award and execute numerous public works contracts in the manner specified by state law and local charters.

B. Interest of Amici

Amici have concluded that this case presents an issue of exceptional importance to municipalities because the holding that an ordinary public works contract creates a protected property interest under the Fourteenth Amendment to the U.S. Constitution holds the potential to open an entirely new realm of municipal liability. All cities utilize contractors to deliver municipal services; indeed some cities use contractors for all of their services. (*See*, Miller, *Cities by Contract: The Politics of Municipal Incorporation* (MIT Press 1981).) Unfortunately, disputes with contractors are an unavoidable part of contemporary public works administration. (*See*, Martin, *Management of Public Works Construction Projects*, pp. 121-122 (American Public Works Assoc. 1999).) If the decision below stands, state and local governmental agencies will face the threat of a federal civil rights suit, and a potential attorneys fees

award under 42 U.S.C. § 1988, in every dispute with a contractor.

C. Source of Authority

Amici are authorized by state law or local charter to participate in any judicial proceedings related to their operations. This brief is filed under the authority of U.S. Supreme Court, Rule 37.[1] Both Petitioner and Respondent have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Under this Court's precedents, the concept of a "property interest" protected by the Fourteenth Amendment is not strictly limited to real estate, chattels or money. But, this Court has also recognized that the range of protected interests is not infinite; the term "property" must be given some meaning. As Amici explain here, the decision below recognizing that an ordinary public works contract may create a protected property interest is erroneous for two reasons. First, a public works contract is fundamentally different from a contract of employment – the only type of contract recognized to create a property interest. Most significantly, the relationship between a public works contractor and the public agency is strictly limited at its inception to a limited time period and provides absolutely no assurance of continued work.

[1] Amici are cities, towns, or similar entities organized pursuant to the Constitution and laws of the State of California. The Board of Port Commissioners of the City of Oakland possesses exclusive control over the city's maritime and aviation matters. (*City of Oakland v. Hogan*, 41 Cal.App.2d 373, 342-725, 106 P.2d 897 (1940).) Counsel for a party did not author this brief in whole or in part. No person or entity, other than Amici, or their counsel, made any monetary contribution to the preparation and submission of this brief.

Additionally, the relationship between the public works contractor and the public entity is by definition one of hirer and independent contractor, non-exclusive, subject to numerous permutations and variations, and provides for payments contingent upon satisfactory performance. Second, even if the contractor's interest is characterized as receiving payment for its work, the California Legislature has chosen not to confer a property interest in anticipated payments under a public works contract. The contractor's entitlement to payment is by law contingent upon its satisfactory performance, including payment of sub-contractors and suppliers, and upon timely completion of the project. Finally, as a matter of public policy, the decision below will seriously impede the development and maintenance of vital public infrastructure.[2]

I.

A PUBLIC WORKS CONTRACT DOES NOT CREATE "PROPERTY" WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT BECAUSE THE CONTRACTOR'S RELATIONSHIP WITH THE PUBLIC AGENCY IS INHERENTLY TEMPORARY, NON-EXCLUSIVE AND SUBJECT TO LIMITLESS VARIATIONS.

"The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty'." (*American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 59, 119

[2] Amici agree with Petitioner's argument that G & G failed to prove the required element of state action as necessitated by *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999). However, as Amici explain, the majority opinion is also fatally flawed in that it holds that an ordinary commercial contract with a public entity creates a protected property interest, sufficient to create a federal cause of action in an ordinary contract dispute.

S. Ct. 977, 143 L. Ed. 2d 130 (1999).) As explained below, the transitory commercial interests of a public works contractor are fundamentally different from the types of interests that this Court has previously recognized as "property."

Since 1970, the conceptual contours of protected property interests have expanded beyond tangible property to embrace various species of government-created benefits, such as welfare and social security benefits. (*Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970); *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).) Amici do not dispute the correctness of this Court's decisions recognizing an individual's property interests in welfare or social security benefits. Instead, Amici contend that the transitory commercial interests of a public works contractor fall well outside the boundaries of this Court's past precedents.

There is a fundamental distinction between welfare and social security recipients on the one hand, and public works contractors, on the other. The welfare or social security recipient is under no reciprocal obligation to the government in exchange for the benefits received; having met the statutory eligibility criteria, the recipient need not provide any service or commodity to the government. The amount of a recipient's benefits does not vary depending upon the quality and quantity of his or her performance. In contrast, award of a public works contract does not immediately entitle the contractor to receive payment of the contract price. The contractor must first deliver complete performance as defined by the terms and conditions of the contract. The public works contract strictly specifies the quantity, quality and schedule for the work. Until the contractor has performed to the satisfaction of the public agency, it has only a "unilateral expectation" of payment, but not a "legitimate claim of entitlement." (*Cf. Board of Regents of State Colleges v. Roth*, 408 U.S. 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548.)

It has long been recognized that a contract with a public entity may provide the source for a protected property interest. (*Roth, supra*, 408 U.S., at 570, 572, 92 S. Ct. 2701, 33 L. Ed. 2d 548.) To date, however, this Court has found only that contracts of employment are sufficient to create a protected property interest. (*Id., see also, Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).) In determining whether an interest rises to the level of "property", this Court must examine not the "weight" of the asserted interest, but "the nature of the interest at stake." (*Roth, supra*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548.) The employee tenure cases may be explained by the importance of employment to the individual in modern society: "It is a purpose of the ancient institution of property to protect those claims upon which *people rely in their daily lives*, reliance that must not be arbitrarily undermined." (*Roth, supra*, 408 U.S., at 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 [emphasis added].) Contemporary employment relationships provide the employee more than simple monetary remuneration; an employees's health care, retirement pension, investments and, sometimes, even sense of identity are also bound up in the relationship.

In *Roth*, this Court considered the claim of a non-tenured college professor hired for a fixed annual term. Under the relevant rules of the Board of Regents, Roth was notified that he would not be retained for the following academic year. The only question considered by this Court was whether the Fourteenth Amendment required the Board to provide Roth with notice and a hearing prior to making the non-retention decision. This Court held that the Board was not required to provide notice and a hearing because it did not deprive Roth of "property" within the meaning of the Fourteenth Amendment. The applicable state laws and regulations provided Roth with only a fixed annual term of employment and "secured absolutely no interest in re-employment for the next

year." (*Roth, supra,* 408 U.S., at 578, 92 S. Ct. 2701, 33 L. Ed. 2d 548.)

The transitory commercial interests of a public works contractor are of a qualitatively different nature from the individual interest of an employee.

First, like the fixed annual contract considered in *Roth,* a public works contract creates an inherently temporary commercial relationship between the contractor and the public agency that lasts only until the project is complete. (*See,* Martin, J., *Management of Public Works Construction Projects,* pp. 114-116 (American Public Works Assoc. 1999).) The inherent temporal limitation in a public works contract is indistinguishable from the one-year employment contract at issue in *Roth.* Standing alone, this fundamental feature disqualifies a public works contract from the category of protected property interest. (*Roth, supra,* 408 U.S., at 578, 92 S. Ct. 2701, 33 L. Ed. 2d 548.) However, the public works contractor's claimed property interest is even weaker than that asserted by Professor Roth because the contractor's scope of work is also precisely defined to a degree that would be intolerable in an employment relationship. The strict limits upon the contractor's scope of work are highlighted by the fact that, unlike an employee, a public works contractor is entitled to equitable adjustments in its payments when the nature of the work deviates from the contractually defined scope of work. (*Souza & McCue Constr. Co. v. Superior Court,* 57 Cal.2d 508, 20 Cal.Rptr. 634 (1962).)

Second, the relationship between the public entity and the contractor is rarely exclusive; the contractor is at liberty to work on other projects simultaneously.[3] As a

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[3] It is this fact that necessitated the recognition of the "Eichleay formula" for apportioning a contractor's lost home office overhead among numerous projects in order to measure indirect damages caused by the contracting agency. (*See, Capital*

result, public works contractors have a greater ability than public employees to protect themselves from unfair treatment by public agencies either by adjusting their bids or simply avoiding bidding in the first instance.[4] Indeed, in formulating their bids, public works contractors consider an agency's (positive or negative) reputation for fair dealing, the agency's reputation for making prompt payments, the reasonableness of liquidated damages measures and the availability of other, more attractive, projects. (Martin, *supra,* pp. 54, 65, 95.)

Third, by definition a public works contractor acts as an independent contractor whose payments are measured by its satisfactory performance. Contractors and sub-contractors are engaged in a distinct, legally defined, occupation or calling. (*Green v. Soule,* 145 Cal. 96, 99, 78 P. 337 (1904); *Sparks v. Folsom Co.,* 217 Cal.App.2d 279, 288, 31 Cal.Rptr. 640 (1963).) Only licensed contractors may be awarded a public works contract. (Cal. Bus. & Prof. Code, § 7028.15 (Deering's 1993).) Payments to the public works contractor are based only upon estimates of the work completed as determined by the public agency. (Cal. Pub. Con. C. §§ 9203, 10261 (Deering's 1994 and 2000 pkt. supp.), *see also,* Part II, *infra.*)

Elec. Co. v. United States, 729 F.2d 743 (Fed. Cir. 1984); *Howard Contracting, Inc. v. G.A. McDonald Construction Co., Inc.,* 71 Cal.App.4th 38, 83 Cal.Rptr.2d 590 (1998).)

[4] Professor Terrell argues that the Due Process Clause's function of discouraging arbitrary government action is of limited importance when external constraints have the same effect: "The most important external constraint for our purposes is the general effect that marketplace competition has on government behavior and individual choice." (Terrell, Timothy P., *"Property", "Due Process" and the Distinction Between Definition and Theory in Legal Analysis,* 70 Geo. L.J. 861, 901 (Feb. 1982).)

Finally, interests that are by their nature amorphous and limitless are outside the original intent that animated the drafters of the Fourteenth Amendment. (*Paul v. Davis*, 424 U.S. 693, 698-699, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976).) While the concept of "property" has not been strictly limited to actual ownership of real estate, chattels or money, this Court has acknowledged that "the range of interests protected by due process is not infinite", for the term "property" as used in the Fourteenth Amendment "must be given some meaning." (*Roth, supra*, 408 U.S., at 570, 572, 92 S. Ct. 2701, 33 L. Ed. 2d 548; *see, Paul, supra*, 424 U.S., at 698-699, 96 S. Ct. 1155, 47 L. Ed. 2d 405.)

Employment relationships all share the common structure of an individual person's commitment to perform generally described duties in exchange for defined pay and benefits. This structural consistency ensures that the term "property" is applied to interests with definite form and substance. In contrast, the structure of a relationship between a public works contractor and a public agency, as well as the form of the contractor, is subject to myriad variations spawned by the commercial marketplace. A public works contractor may assume the form of a sole proprietorship, partnership, corporation, or a joint-ventures of each. (Cal. Bus. & Prof. C. §§ 7025, 7029-7079.1, 7076 (Deering's 1993.) They may consist of joint-ventures between design professionals and licensed builders. (Cal. Bus. & Prof. C. § 7029.) To an even greater degree, the nature of the commercial terms is also highly variable and includes such options as building according to prepared plans and specifications, design-build, sale and lease-back arrangements, and design-build-operate agreements. (*See*, Cal. Gov. C. §§ 13332.19 (Deering's 2000 pkt. supp.), 14661 (Deering's 1999), Cal. Pub. Con. C. § 20670 *et seq.* (Deering's 1994).) Applying the term "property" to an interest subject to such kaleidoscopic variations serves only to dilute the meaning of the term.

Together or individually, the inherent features of public works contracts distinguish them from the individual contract-based interests that have thus far received constitutional protection. In contemporary society, employment may be properly characterized as a property interest given its overriding importance to the individual. (*San Bernardino Physicians' Services Medical Group v. County of San Bernardino*, 825 F.2d 1404 (9th Cir. 1987); *S & D Maintenance Co., Inc. v. Goldin*, 844 F.2d 962 (2nd Cir. 1988).) To extend such protection, however, to ordinary commercial contracts simply because one of the parties is a public agency is unwarranted given the fundamental differences in the duration and scope of the relationship, the non-exclusive nature of the relationship, the fact that an independent contractor whose payments are measured by the agency's satisfaction is legally distinct from an employee and the limitless variation in the forms of public works contractors and their commercial relationships with public agencies. Amici therefore urge this Court to hold that a public works contract cannot be the source of a property interest under the Fourteenth Amendment.

II.

ANTICIPATED PAYMENTS UNDER A PUBLIC WORKS CONTRACT ARE NOT PROPERTY WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT BECAUSE AS A MATTER OF LAW THE CONTRACTOR IS NOT ENTITLED TO PAYMENT UNTIL IT SATISFIES THE TERMS OF THE CONTRACT.

In its decision below, the majority suggest that the locus of the contractor's property interest is its interest in "being paid in full for the construction work it has completed." (*G & G Fire Sprinklers v. Bradshaw*, 156 F.3d 893, 901 (9th Cir. 1998) reinstated, *G & G Fire Sprinklers v. Bradshaw*, 204 F.3d 941 (9th Cir. 2000).) Therefore, the

lower court held that the State was required to provide due process prior to withholding G & G's anticipated payments. As described above, Part I, the inherent features of a public works contract bar its characterization as property. However, even characterizing the contractor's interest as one in anticipated payments is unavailing because a property interest is created and defined in statutory terms and a state legislature may elect not to confer a property interest at all. (*Cf. Cleveland Bd. Of Ed., supra*, 470 U.S., at 541, 105 S. Ct. 1487.). As Amici explain next, the California Legislature has elected not to confer a property interest in anticipated payments under a public works contract.

In California, anticipated payments under a public works contract fall into the same constitutional category of "non-property" as the disputed workers' compensation benefits at issue in *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999) ("*American Manufacturers*"). In *American Manufacturers*, this Court considered whether the Due Process Clause permits workers' compensation insurers to unilaterally withhold disputed medical treatment prior to a determination that the medical treatment was reasonable and necessary. Under the insurance program at issue in *American Manufacturers*, state law entitled injured workers to receive all "reasonable" and "necessary" medical treatment for work-related injuries. The insurer, however, was authorized to dispute the amount of medical payments if they were deemed unreasonable or unnecessary. Moreover, pending a determination of the issue by a neutral party, state law authorized the insurer to withhold payment for medical treatment. Respondent employees filed suit alleging that the medical benefits constituted "property" that could not be withheld without first affording the injured worker due process.

In rejecting the employees' claims, this Court distinguished the asserted property interest from other types of

government payments, such as welfare payments and social security disability payments, which have achieved the status of property. (*American Manufacturers, supra*, 526 U.S., at 60, 119 S. Ct. 977, 143 L. Ed. 2d 130; citing, *Goldberg, supra*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 and *Mathews, supra*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18.) The employees' claims for medical benefits were "fundamentally different" from such statutory entitlements because state law expressly limited the employee's entitlement to reasonable and necessary medical treatment. Most significantly, state law required that disputes over the reasonableness of and necessity of a particular treatment be resolved before an employer's obligation to pay – and an employee's entitlement to benefits – arose. (*American Manufacturers, supra*, 526 U.S., at 60, 119 S. Ct. 977, 143 L. Ed. 2d 130.) The injured employee's property interest arose, if at all, only after he or she established both that the employer was liable *and* that the medical treatment was reasonable and necessary. The result reached in *American Manufacturers* is an elaboration of this Court's previous observation that the Fourteenth Amendment provides a safeguard of "the security of interests that a person has *already* acquired in specific benefits." (*Roth, supra*, 408 U.S., at 576, 92 S. Ct. 2701, 33 L. Ed. 2d 548 [emphasis added].)

As explained in detail below, four features of public works contracting in California establish that the Legislature has elected not to confer a property interest in anticipated payments under a contract: 1) satisfactory performance of the contract is a condition precedent to any entitlement to payment, 2) public agencies are authorized to withhold disputed payments pending resolution of the dispute, 3) payments are subject to withholding of liquidated damages, and 4) public agencies must retain a portion of each progress payment until the project is accepted as complete. Considered together or individually, these statutory features establish contingencies that

are indistinguishable from the "reasonable and necessary" requirement at the center of this Court's holding in *American Manufacturers*.

A. Satisfactory Performance of a California Public Works Contract is a Condition Precedent to Any Entitlement to Payment.

"As a general proposition, complete performance of a public improvement contract is a condition precedent to the right to recover compensation." (McQuillin, E., Muni. Corp., § 137.132 (3rd Ed.) Clark, Boardman, Callaghan.) A condition precedent is an act which must be performed before the promisor's duty of performance arises. (Cal. Civ. C. § 1436 (Deerings 1994).) Therefore, as a general matter, a contractor has no legitimate claim of entitlement to being paid until it has delivered satisfactory performance under the contract. This principle is embodied in the California Public Contract Code under various provisions that condition payment to the contractor on satisfying the public agency. For example, payments upon contracts must be made based on estimates of work completed which are made and approved by the agency. (Cal. Pub. Con. C. §§ 9203 (local agencies), 10261 (state agencies) (Deerings 1994 and 2000 pkt. supp.).) Significantly, the State Controller is authorized to make payments to contractors only upon the State-approved estimates. (Cal. Pub. Con. C. § 10261.)

Thus, at the outset, the contractor's entitlement to payment does not arise until its performance is satisfactory to the public agency.

B. With Respect to "Disputed Amounts" The Public Agency May Withhold Anticipated Payments Pending Resolution of the Dispute.

California law requires public agencies to promptly make progress payments to prime contractors, and that

prime contractors make prompt payments to sub-contractors. The Legislature, however, has unambiguously exempted "disputed amounts" from this requirement. (Cal. Pub. Con. C. §§ 7107 (Deering's 2000 pkt. supp.), 10261.5 (Deering's 1994), 10853 (Deering's 1994), 20104.50 (Deering's 1994), Cal. Civ. C. § 3320 (Deering's 2000 pkt. supp.), Cal. Gov. C. §§ 926.19, 927.3 (Deering's 2000 pkt. supp.)[5] Moreover, state law provides that in the event of a dispute between the public agency and the contractor, the agency may "withhold from the final payment an amount not to exceed 150 percent of the disputed amount." (Cal. Pub. Con. C. §§ 7107, subd. c.) Even on projects constructed under private contract, the owner may withhold from the contractor 150% of disputed amounts if the project is ultimately intended for use by the public. (Cal. Civ. C. § 3260, subd. c(3) (Deering's 2000 pkt. supp.)

Similarly, state law imposes a duty on a public agency to withhold payments from the prime contractor upon the request of an unpaid sub-contractor or material supplier. (Cal. Civ. C. § 3179, *et seq.* (Deering's 1986).) Upon receipt of a "stop notice" from the unpaid sub-contractor, the public agency is required to withhold the disputed amount pending resolution of the dispute. (Cal. Civ. C. § 3186 (Deering's 2000 pkt. supp.).) The contractor may obtain release for the withheld payment, but only if it first submits to the public agency a bond equal to 125% of the disputed amount. (Cal. Civ. C. § 3196, (Deering's 1986).)

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[5] *Breda Costruzioni Ferroviarie v. Los Angeles County Metropolitan Transportation Agency*, 56 Cal.App.4th 1433, 66 Cal.Rptr.2d 416 (1997), is not to the contrary. There, the court held only that interest earned on temporarily withheld funds under a public contract must be paid to the contractor. One commentator has criticized the decision as "based on uninformed assumptions." (Acret J., *California Public Construction Contract Law Handbook*, 191 (BNI Publications-2000).)

C. Payments Under Public Works Contracts Are Subject to Withholding of Liquidated Damages.

The Legislature's requirement that the public agencies include in their contracts liquidated damages provisions is yet another signal of its intent not to confer property status on anticipated payments to a public works contractor.

The decision below cannot be reconciled with the fact that the Legislature has mandated that state agencies include liquidated damages provisions in all public works contracts. Liquidated damages clauses "are intended as a more direct, faster and cheaper alternative than litigation for setting time-related financial damages." (Martin, *supra*, 54, *see also*, McQuillin, § 137.141.) Acret opines that "liquidated damages provisions are particularly appropriate to public contracts" in light of the difficulty of establishing damages for lost use. (Acret, *supra*, § 4.17, p. 46.) The State must include in its public works contracts provisions permitting the forfeiture of liquidated damages for late completion – "to be deducted from any payments due or to become due." (Cal. Pub. Con. C. § 10226 (Deerings 1984).) Any city, county or district may include in its public works contracts a late-completion provision under which a specified sum of money is to be "deducted from any payments due or to become due to the contractor." (Cal. Gov. C. § 53069.85 (Deering's 2000 pkt. supp.)

D. All Progress Payments Under a Public Works Contract Are Subject to Retention of Five Percent.

"The hallmark of a protected property interest is the right to exclude others." (*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 672, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999).) For public works contracts, the Legislature has mandated that a portion of the contractor's earned progress payments be

withheld during the project – these funds are known as "the retention." As a matter of law, the public works contractor is neither entitled to, nor in exclusive control of, the retained funds until its *total* performance is complete according to the terms of the contract.

A leading authority on California construction law explains, "[T]he purpose of the retention is to provide economic motivation for the contractor to complete the project and to give the public agency financial security . . . [F]or example, the agency could use the retained funds to repair defective work." (Acret J., *California Public Construction Contract Law Handbook*, § 4.04 (BNI Publications – 2000); *see also*, McQuillin, *supra*, Muni. Corp., § 37.179.) Under California law, local agencies must retain "not less than five percent of the contract price until *final completion and acceptance of the project*." (Cal. Pub. Con. C. § 9203 (Deering's 1994) [emphasis added].) The requirement to include retention provisions in public contracts also applies to state agencies and the California State University (Cal. Pub. Con. C. §§ 10261, 10851 (Deering's 1994).) Thus, like the injured workers considered in *American Manufacturers*, a California public works contractor does not possess a fully matured entitlement to receive even its earned, but retained, funds until final completion and acceptance of the project. Similarly, the very purpose for which funds are retained, to motivate the contractor and provide potential compensation to the public agency for defaults, establishes that where a dispute exists as to the contractor's entitlement, there can be no constitutionally protected property interest in the retained funds. (*Cf. American Manufacturers, supra*, 526 U.S., at 60, 119 S. Ct. 977, 143 L. Ed. 2d 130.)

The retention escrow provisions of state law further highlight both the contractor's contingent entitlement to the retained funds and its lack of exclusive control of the retained funds. Contractors may substitute securities for the retention amount, but only if the securities are held in

escrow by a state or federally chartered bank. (Cal. Pub. Con. C. §§ 10263, 22300 (Deering's 2000 pkt. supp.).) Only upon "*satisfactory completion* of the contract" can the securities be returned to the contractor. (Cal. Pub. Con. C. §§ 10263, 22300, subd. (a) [emphasis added], *see also*, the terms of the mandated Escrow Agreement included with the statute.) Under this Court's holdings in *American Manufacturers, supra*, and *College Savings Bank, supra*, the retention provisions of California law are additional indicia of the Legislature's intent not to confer a property interest in anticipated payments under a public works contract.[6]

In sum, like the medical benefits in *American Manufacturers*, anticipated payments under a California public works contract cannot constitute "property" until all statutory conditions precedent for their payment are satisfied. Under California law, the contractor does not have a legitimate claim of entitlement to payments until it satisfactorily performs according to the contract terms, as approved by the public agency, resolve disputes, pay its sub-contractors and suppliers, and completes the work on schedule. The decision below simply cannot be reconciled with the clear intent of the California Legislature not to confer the status of "property interest" on payments under a public works contract. Therefore, Amici urge this Court to hold that anticipated payments under a public works contract do not constitute a property interest under the Fourteenth Amendment.

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[6] It may be the case that the retention is insufficient to compensate the contracting agency for contractor caused damages. Therefore, in the event that the public agency suffers damages in excess of the retention amount, the contractor and its surety are liable to the agency for the excess. (Cal. Pub. Con. C. §§ 10258, 20490.)

III.

THE DECISION BELOW WILL SERIOUSLY IMPEDE THE DEVELOPMENT AND MAINTENANCE OF VITAL PUBLIC INFRASTRUCTURE BY CONVERTING ORDINARY CONTRACT DISPUTES INTO FEDERAL CIVIL RIGHTS CLAIMS WHICH ALLOW FOR INDIVIDUAL LIABILITY AND PREVAILING PLAINTIFF ATTORNEY'S FEES UNDER 42 U.S.C. SECTION 1988.

In his dissenting opinion in the original *G & G Fire Sprinklers* decision, Judge Kozinski identified with striking clarity the detrimental impact the majority opinion will have on state and local governments. (*G & G Fire Sprinklers, supra*, 156 F.3d, at 909-910.) Amici share Judge Kozinski's concern that the majority holding will hobble the ability of public entities to construct and maintain vital public improvements.

The identical concern expressed by this Court in *Paul v. Davis* is presented in the decision below. (*Paul, supra*, 424 U.S., at 698-699, 96 S. Ct. 1155, 47 L. Ed. 2d 405.) To paraphrase this Court's holding in *Paul v. Davis*, the reasoning of the majority opinion below would seem almost necessarily to result in every breach of a public works contract by a state or local agency establishing a violation of the Fourteenth Amendment. As noted by Judge Kozinski, the result adopted by the majority opinion will effectively "constitutionalize" a broad swath of garden variety contract disputes simply because one of the parties is a government agency. (*G & G Fire Sprinklers, supra*, 156 F.3d, at 909.) At least 16 other federal judges have expressed the same concern.[7]

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[7] *See, S & D, supra*, 844 F.2d 962 [Feinberg, Newman, Winter, JJ.]; *Unger v. National Residents Matching Program*, 928 F.2d 1392 [Hutchinson, Resenn, JJ.]; *Martz v. Incorporated Village of Valley Stream*, 22 F.3d 26 [Miner, Mahoney, Restani, JJ.]; *San Bernardino Physicians, supra*, 825 F.2d 1404 [Hug, Canby, Norris, JJ.];

In particular, two aspects of § 1983 liability will fundamentally alter the dynamics of public works administration to the detriment of the public. First, the decision below will discourage vigorous protection of the public fisc by permitting imposition of individual liability upon project managers, engineers and administrators. (*See, e.g., Hafer v. Melo,* 502 U.S. 21, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991).) As noted by Judge Kozinski, "when the government is acting as a commercial entity, taxpayers cajole it to act with all the ferociousness the marketplace demands." (*G & G Fire Sprinklers, supra,* 156 F.3d, at 910, n.2.) Self-evidently, the prospect of individual liability under § 1983 will be a disincentive for public works managers to vigorously enforce the terms of commercial contracts in order to obtain complete performance. The taxpayers will bear the consequences in the form of higher costs and delayed completion of critical public improvements.

Second, as the instant case illustrates, liability under § 1983 carries with it the right to prevailing plaintiff attorney's fees under 42 U.S.C. § 1988. Under California law, parties to an ordinary breach of contract action are entitled to recovery of attorney's fees only if their contract specifically provides such a remedy. (Cal. Civ. C. § 1717 (Deerings 1994); *Excess Electronixx v. Heger Realty Corp.*, 64 Cal.App.4th 698, 75 Cal.Rptr.2d 376 (1998).) However, as a practical matter, the majority opinion may result in the imposition of a significant contract remedy in every public works contract, regardless of the mutual assent of the parties.

The contours of the expanded zone of § 1983 liability which might result if the decision below is allowed to

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Walentas v. Lipper, 862 F.2d 414 (2nd Cir. 1988) [Mahoney, Winter, JJ.]; *Reich v. Beharry,* 883 F.2d 239 [Seitz, Stapleton, Cowan, JJ.].

stand are suggested by the frequency with which payments are withheld from contractors in the course of a construction project. The withholding or partial withholding of payments by a project owner is an inherent feature of construction projects, whether privately or publicly owned. (*See,* Sweet & Sweet, *Sweet on Construction Industry Contracts-Major AIA Documents,* § 15.11 (4th Ed.) (Aspen Law & Business 1999).) Moreover, in California numerous statutes authorize or require state and local agencies to withhold funds from a contractor for such reasons as failure to execute a contract after award (Cal. Pub. Con. C., §§ 10164, 10781, 10782, 20103.5, 20172, 20418 (Deering's 1994)), as liquidated damages (Cal. Pub. Con. C. §§ 10226, 10826 (Deering's 1994)), Cal. Gov. C. § 53069.85 (Deering's 2000 pkt. supp.), due to disputes regarding amounts due (Cal. Pub. Con. C. § 7107, § 10262.5 (Deering's 2000 pkt. supp.)), and in order to protect the rights of a sub-contractor or supplier (Cal. Civ. C. § 3186 (Deerings 2000 supp.)). Indeed, the construction industry's own standard contract specifications make frequent use of this commercially accepted practice. (Public Works Standards, Inc., *Greenbook: Standard Specifications for Public Works Construction* (2000 ed.) § 4-1.1 (deduction for defective materials or work); § 6-2 (deduction for failure to provide for public safety, traffic and protection of work); § 6-9 (liquidated damages) (BNI Publications, 1999).)

In sum, if the decision below is allowed to stand, disputes surrounding the administration of public works contracts will escalate into civil rights litigation. Public project managers will find themselves threatened with personal liability for decisions that are a common practice in the private sector. Public agencies will encounter greater difficulty in resolving disputes informally where the promise of an attorney's fee award awaits the successful contractor. Ultimately, the public will suffer the effects in delay, expense and substandard infrastructure.

CONCLUSION

Based on the foregoing, Amici urge the Court to hold that neither a public works contract, nor anticipated payments under such a contract, constitute "property" under the Fourteenth Amendment. The decision below should therefore be reversed.

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No. 00-152

IN THE
Supreme Court of the United States

VICTORIA BRADSHAW, *et al.*,
Petitioners,

v.

G & G FIRE SPRINKLERS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) moves for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have granted their consent to the filing of said brief. Respondent's counsel has not responded to a request for consent. In support of this motion the AFL-CIO states as follows:

1. The AFL-CIO is a federation of 67 national and international unions with a total membership of approximately 13 million working men and women. Many of these workers are employed on public work projects, are protected by laws, like the California law at issue in this case, that

require contractors and subcontractors to pay prevailing wages, and have a vital interest in assuring that the prevailing wages are paid. That being so, the AFL-CIO's affiliate, the State Building and Construction Trades Council of California, AFL-CIO, participated as an *amicus curiae* in the court below.

2. In California, as in many other jurisdictions, the contractor/subcontractor obligation to pay prevailing wages is a material term of public works contracts and subcontracts. The decision below invalidated on procedural due process grounds a statutory scheme pursuant to which the State withheld contract payments from its contractors because of contractor/subcontractor noncompliance with the contractual obligation to pay prevailing wages. Public owner withholding of payment to contractors is the standard method of ensuring compliance with prevailing wage requirements, just as it is the standard method by which public and private owners ensure that their contractors comply with other material stipulations in a contract.

3. In the accompanying *amicus curiae* brief, we show that the respondent was *not* deprived of a property interest by the withholding of contract payments here. This Court made clear in *American Manufacturers Insurance Co. v. Sullivan*, 526 U.S. 40 (1999), that a claimant has no property interest in the immediate payment of money until the claimant's entitlement to that payment has been established under state law. In this case, respondent has not established that it complied with the prevailing wage requirement, and such compliance was a condition precedent to the respondent's entitlement to the withheld contract payments. We also show that the theory upon which the decision below ultimately rested—that the respondent has been deprived of a property interest in its *claim* for payment—is no more tenable. This is not a case like *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), in which the State has "destroyed" a legal claim. Here California law provide the respondent the legal means to pursue its claim for the withheld contract payment, which the respondent chose not to pursue.

CONCLUSION

For the foregoing reasons, this motion to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), files this brief *amicus curiae* contingent on the granting of the forgoing AFL-CIO motion for leave to file said brief.[1]

STATEMENT

1. The Statutory Scheme.

At the *federal* level, the Davis-Bacon Act, 46 Stat. 1494, as amended, 40 U.S.C. § 276a, provides that contractors and subcontractors on federal public works projects must pay their employees at least the same wages paid in the project's locality on similar, private construction projects. Many states, California among them, have followed the same course by providing that all contractors and subcontractors on *state and local* public works projects must pay their employees "not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed." Cal. Labor Code § 1771.

The obligation to pay prevailing wages is a material term of California public works contracts. When a public agency awards such a contract to a general contractor, the agency must "cause to be inserted in the contract a stipulation" that the general contractor will ensure that all employees on the project are paid prevailing wages. Cal. Labor Code § 1775. State law further requires the awarding body to specify "in the call for bids for the contract, and in the bid specifications

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

and in the contract itself" the applicable prevailing wage rates (or provide notice that the wage rates are available upon request) and to post those rates at the job site. *Id.* § 1773.2. Public works contracts must also include a stipulation by the general contractor that, if prevailing wages are *not* paid to all employees on the project, the general contractor will be liable to the awarding body for back wages and penalties. *Id.* § 1775.

The California prevailing wage law contemplates that a general contractor on a public work project may, as is typical in the construction industry, retain subcontractors to carry out various aspects of the contracted-for work. The California Labor Code provides that "[w]orkers employed by contractors or *subcontractors* in the execution of any contract for public work are deemed to be employed upon public work," § 1772 (emphasis added), and, accordingly, requires that both "[t]he contractor to whom the contract is awarded, and any *subcontractor* under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract," § 1774 (emphasis added).

That being so, the California law includes several provisions designed to insure that subcontractors on public work projects pay their employees the prevailing wage. The law requires that "[t]he contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of [the prevailing wage statute]." Cal. Labor Code § 1775(b)(1). The law also requires that "[e]ach contractor and subcontractor shall keep accurate payroll records" for "each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work," and that "[a] certified copy of [these] payroll records . . . shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of

Apprenticeship Standards of the Department of Industrial Relations." *Id.* § 1776 (a). And, the law provides that "[t]he contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor." *Id.* § 1775(b)(2).

Once the project begins, the awarding body must "take cognizance of violations of" the prevailing wage law, Cal. Labor Code § 1726, and "[b]efore making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all wages and penalties which have been forfeited pursuant to any stipulation in a contract," *id.* § 1727. Where payments have been "withheld from [the general contractor] by the awarding body on account of the subcontractor's failure to comply with the [prevailing wage requirements]," the contractor is given permission to "withhold from [the] subcontractor . . . sufficient sums to cover [the amount so withheld]." *Id.* § 1729. In other words, payment of the prevailing wage by the general contractor and the subcontractor is a condition precedent to the general contractor's or the subcontractor's entitlement to the full contract price.

If the awarding body withholds from the payments on a public works project an amount covering wages and penalties owed because of the general contractor's or the subcontractor's failure to pay prevailing wages, and the general contractor or subcontractor wishes to challenge that withholding, state law specifies the remedy. "Suit may be brought by the contractor or his or her assignee" against the awarding body for "recovery of the wages and penalties" being withheld. Cal. Labor Code § 1733. Such a "suit on the contract for alleged breach thereof in not making the payment is the exclusive remedy of the contractor or his or her assignees with reference to those wages and penalties." *Id.* § 1732. "No other issues shall be presented to the court" in

such a lawsuit, and the suit is "without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract." *Id.* § 1733.

If a lawsuit is filed by a general contractor or subcontractor to recover withheld wages and penalties, the awarding body must retain custody of the amount in dispute until that suit is resolved. Cal. Labor Code § 1731. If no suit is filed, or the lawsuit is unsuccessful, the back wages are distributed to workers, and the penalties are paid to the State. *Id.*

2. The Facts.

Respondent G & G Fire Sprinklers, Inc. (G&G) performed work as a subcontractor on three public works projects in California. Pet. App. 23. On each of those projects, the awarding body withheld payment from the general contractor, pursuant to the prevailing wage stipulation in the contracts, based on G & G's failure to pay the prevailing wage in performing its work on the subcontract. *Id.* The awarding bodies had been directed to withhold these funds by the state's Division of Labor Standards Enforcement (Labor Standards Division or DLSE), which serves as the lead agency for the enforcement of the prevailing wage laws. *Id.*; Cal. Labor Code § 90.5(b). DLSE sent to G & G and to the general contractor a copy of each notice it sent to the awarding body. *See* J.A. 195-222.

After the awarding bodies withheld payments from the general contractors, these general contractors, in turn, withheld the same amounts from their payments to G & G on the subcontracts. Pet. App. 23. California law provides that "[i]t shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the subcontractor's failure to comply with" the prevailing wage law. Cal. Labor Code §1729.

3. The District Court's Ruling.

After the general contractors withheld payment on the subcontracts, G & G brought suit in the United States District Court against the California Labor Standards Division and various State officials under 42 U.S.C. § 1983. J.A. 16. G & G alleged that it had been deprived of property without due process because, as a result of the issuance of notices to withhold by DLSE to the awarding body: i) payments that G & G claimed to be due under its subcontracts had been withheld by the general contractors; and ii) G & G had not been provided with a hearing on whether it had failed to pay the prevailing wage or to contest the amount of the wages and penalties withheld. J.A. 62-78.

G & G did not put into the record the awarding-body/general-contractor contracts or the G & G/general-contractor subcontracts. Nor did G & G make any claim that: i) those contracts did not contain the mandated stipulation requiring the payment of prevailing wages and stating that, if the prevailing wages were not paid, the awarding body was entitled to withhold payments from the general contractor to cover the unpaid portion of wages and penalties; ii) G & G had a right to full contract payment even if G & G had not paid prevailing wages in carrying out the subcontracts; or iii) G & G had taken any action to challenge the withholding of payment on the subcontracts and to secure full payment prior to filing its due process suit in federal court.

The district court granted G & G's motion for summary judgment, striking down California Labor Code §§ 1727, 1730-33, 1775, 1776(g) and 1813 as in violation of the Due Process Clause. Pet.App. 86. The district court also enjoined the Labor Standards Division from enforcing those provisions against G & G, and declared the notices to withhold issued by DLSE for the three projects to be invalid. *Id.* The district court did not issue an opinion explaining the basis for its decision.

4. The Ninth Circuit's Rulings.

a. In its first decision in this matter, the Ninth Circuit in a 2-1 panel decision (Circuit Judges Hawkins and Reinhardt in the majority, Circuit Judge Kozinski in dissent) reversed the district court's injunction as overbroad but affirmed the summary judgment below insofar as it held that California had denied G & G due process. Pet. App. 39-41.

The court of appeals concluded that G & G had a "property interest in being paid in full for the construction work it has completed," and that "[t]he state's withholding . . . has deprived G & G of its interest." Pet. App. 30.

Having concluded that "G & G has suffered a deprivation of a protectible property interest as a result of the state's action," the Ninth Circuit turned to consideration of "whether the state accorded G & G due process when it effected this deprivation." Pet. App. 34. The court of appeals held that the Due Process Clause would be satisfied by either a "pre-deprivation" hearing or a reasonably prompt "post-deprivation" hearing, but that California's statutory scheme was deficient because it did not provide either type of hearing to subcontractors. Pet. App. 34-37. And, the majority concluded that, in any event, the availability under state law of a lawsuit to recover the withheld funds would not satisfy the requirements of due process, apparently because such a suit would not provide a sufficiently prompt hearing to remedy the "deprivation" of G & G's "property." Pet. App. 36-37 n.9.

Judge Kozinski dissented, stating that the case presented a "run-of-the-mill" contract dispute and that a contractor is not deprived of "property" for due process purposes simply because the State as party to a contract chose to withhold a contract payment on account of non-compliance with a term of the contract. Pet. App. 49-50. The dissent also disputed the majority's premise that state law provided a subcontractor

like G & G with no remedy at all to recover the sums it claimed to be owed. Pet. App. 50.

b. California petitioned this Court for a writ of *certiorari*. While that petition was pending, this Court issued its decision in *American Manufacturers Mutual Ins. Co. v. Sullivan*, 526 U.S. 40 (1999), rejecting a procedural due process challenge to a state statutory scheme for providing workers' compensation benefits. After the *Sullivan* decision issued, this Court granted the State's *certiorari* petition, vacated the Ninth Circuit's decision, and remanded the case for reconsideration in light of *Sullivan*. *Bradshaw v. G & G Fire Sprinklers, Inc.*, 526 U.S. 1061 (1999).

c. Following the remand, the Ninth Circuit panel (again in a 2-1 decision) issued an order "reinstating [its] judgment and opinion" based on its "determin[ation] that *Sullivan* is fully consistent with our analysis." Pet. App. 3. In this reinstatement order, the court of appeals characterized its earlier opinion as "adopt[ing] the approach explicitly preserved by the *Sullivan* majority and unequivocally adopted in Justice Ginsburg's concurrence," *viz.* that G & G did *not* have a property interest in payment of the disputed funds, but rather had such an interest in its *claim* for payment. Pet. App. 5-6. According to the majority, "G & G's due process rights were violated, . . . not because it was denied immediate payment, but because the California statutory scheme afforded *no hearing at all* when state officials directed that payments be withheld." Pet. App. 6 (emphasis supplied).

Judge Kozinski dissented from the reinstatement order, pointing out, among other things, that

> The majority's current position is that its holding is in line with previous Supreme Court precedent protecting plaintiffs' "property interest in their *claims* for payment." . . . . If the property interest at stake here is G & G's *claim* for payment, however, when and how was G & G deprived of it? . . . . G & G has yet to attempt to

file a claim in state court. [Pet. App. 13 (emphasis in original).]

SUMMARY OF ARGUMENT

The threshold issue in this case is whether provisions of the California prevailing wage law violate the federal Constitution by depriving respondent G & G Fire Sprinklers, Inc. of property without due process. The first inquiry under this Court's precedents is whether G & G has been deprived of any "property." G & G's due process claim fails this first inquiry and the court below erred in concluding otherwise.

G & G claims to have been deprived of a property interest because i) the State withheld payment from its general contractors on public works projects on account of the failure of G & G, a subcontractor, to make required prevailing wage payments, and ii) those general contractors, in turn, withheld the same amounts from G & G.

When this case was first before the Ninth Circuit—prior to this Court's decision in *American Manufacturers Insurance Co. v. Sullivan*, 526 U.S. 40 (1999)—the Ninth Circuit, in a 2-1 panel decision, concluded that G & G had a property interest in the immediate payment of the amounts "to which it claims it is entitled" for performing work on the subcontracts. The *Sullivan* decision renders that conclusion untenable.

The contracts and subcontracts for the public works projects made G & G's compliance with the prevailing wage law a condition precedent to G & G's entitlement to contract payments. The awarding body, and apparently the general contractor, disputed that G & G had satisfied this contractual obligation. *Sullivan* makes clear that there is no property interest in the immediate payment of amounts claimed to be due until the claimant has cleared the hurdles necessary for its entitlement to payment to attach under state law. In this case, G & G has not yet cleared that hurdle by showing that it met the contractual requirement to pay prevailing wages.

After this Court vacated the Ninth Circuit's first decision here and remanded this case for reconsideration in light of *Sullivan*, the court of appeal shifted the locus of G & G's property interest. The court below correctly acknowledged that, under *Sullivan*, G & G had no property interest in the immediate payment of the disputed amounts to which G & G claimed entitlement. The court of appeals concluded instead that G & G had a property interest in its *claim* for payment of those amounts, and that the State had destroyed *that* property interest by denying G & G any opportunity to present its claim of entitlement to the withheld contract payments. California law is to the contrary. The prevailing wage law provides expressly for a suit "by the contractor or his or her assignee . . . to establish his or her right to" the amounts withheld. Cal. Labor Code § 1733. G & G could have secured assignments from its general contractors and pursued such suits. So far as the record shows, G & G did not do so and has offered no explanation for its failure.

The Ninth Circuit focused not on the case before it but on the purely hypothetical scenario of a subcontractor that requests and is unable to obtain an assignment from a general contractor and therefore, in the court of appeals' view, is left holding "an empty bag." Under California law, however, this hypothetical subcontractor would have perfectly adequate legal and equitable means to bring its claim for the withheld contract payments. The point here is that G & G—which had ample opportunity to make its claims under state law—did absolutely nothing to make, much less perfect, those claims.

On the foregoing analysis, the question whether the decision of the general contractor to withhold payment from G & G constitutes "state action" is no longer in the case. The only plausible post-*Sullivan* procedural due process argument is that the State has destroyed G & G's *claim* to the withheld contract payments. That argument fails not because of the absence of state action but because the State did not, in fact, destroy G & G's claim.

ARGUMENT

In this case, "G & G challenges the constitutionality of several provisions of the California Labor Code as violative of its federal due process rights." Pet. App. 32.

The California statutory provisions in question, which are "incorporated by state law into all public works contracts, authorize the state to withhold payment of money owed to contractors or subcontractors for alleged violations of the state prevailing wage law." Pet. App. 32. The events precipitating this due process challenge to the State's prevailing wage law occurred when: i) the State withheld a portion of the payments otherwise due to general contractors on various public work projects on the ground that G & G, a subcontractor, had not paid its employees on the projects at the prevailing wage rates; and ii) the general contractors, in turn, withheld a corresponding portion of the amounts otherwise due to G & G under the subcontracts.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Accordingly, "[t]he first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *American Manufacturers Insurance Co. v. Sullivan*, 526 U.S. 40, 59 (1999).

As we now show, G & G's due process claim fails this "first inquiry" and the court below erred in concluding to the contrary.

A. The Ninth Circuit's first—pre-*Sullivan*—due process ruling in this case cannot be squared with this Court's due process analysis in *Sullivan*.

In its first decision, the court of appeals identified G & G's property interest as follows: "G & G's interest arises from its

public works contract; it has a property interest in being paid in full for the construction work it has completed." Pet. App. 30. Having so framed the issue, the Ninth Circuit concluded that "[t]he state's withholding of [the disputed portion of the amount otherwise due under the contract] has deprived G & G of its interest in full payment for services rendered." Pet. App. 30.

In other words, the "property interest" identified by the first Ninth Circuit decision here was G & G's interest in receiving immediate payment of the full amount "it claims it is entitled" to under the subcontracts, even though it is the position of the State—and, apparently of the general contractors—that, under the contracts, G & G is *not* entitled to such full payment. Pet. App. 25.

As Judge Kozinski points out in his dissenting opinion below, this dispute between the State, the general contractors, and G & G over the amount G & G is to be paid and the action of the State and the general contractors in withholding a portion of the payments otherwise due on the grounds that G & G has not fully complied with the prevailing wage provisions of its contracts "is no different from a builder's refusal to make progress payments when he discovers (or believes he has discovered) a failure of performance on any other term of a standard construction contract." Pet. App. 49. Indeed, "[w]ithholding payments under such circumstances is the standard remedy." *Id.* at 50.

The proposition that a person—like G & G—who has a *claim* on the withheld payment has a property interest in the immediate payment of the disputed amount cannot survive *Sullivan*. In that case this Court rejected a procedural due process challenge to a state statutory scheme for providing workers' compensation benefits and did so in terms that govern here.

Under the scheme in *Sullivan*, insurers are required to pay for medical treatment for eligible employees that is

"reasonable and necessary." Insurers may, however, withhold payment if the insurer disputes that a certain treatment is "reasonable and necessary," pending resolution of the dispute. *Sullivan* rejected the employees' contention that the withholding of a disputed payment is a deprivation of "property" within the meaning of the Due Process Clause. 526 U.S. at 60-61.

There was general agreement among members of the Court that the employees could not be regarded as having a property interest in the payments themselves *before* the dispute as to whether the treatment was "reasonable and necessary" had been resolved. 526 U.S. at 60 (majority opinion); *id.* at 62 (Ginsburg, J. concurring); *id.* at 63 (Breyer, J., concurring). *See also id.* at 63-65 (Stevens, J., concurring and dissenting). At the same time, *Sullivan* does not reach the separate question whether the employees "had a property interest in their claims for payment, as distinct from the payments themselves, such that the State, the argument goes, could not finally reject their claims without affording them appropriate procedural protections. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430-31 (1982)." *Sullivan*, 526 U.S. at 61 n.13. *See also id.* at 62 (Ginsburg, J., concurring in the majority opinion on the understanding that it was not reaching the issue whether due process required fair procedures for the adjudication of worker's *claims* for benefits).

Under *Sullivan*, then, there is *no* "property interest in the payment of [amounts claimed to be due]," until the claimant has "clear[ed] [the] hurdles" necessary for the "property interest in the payment of [the claimed amount] to attach under state law." 526 U.S. at 60-61.

In this case, G & G does not dispute that the obligation to pay the prevailing wage was a material term of the subcontracts. Thus, the hurdle that G & G must clear for its asserted "property interest in the payment of [the full amount

provided in the contracts] to attach under state law" is a showing that the subcontractor met the condition in the subcontracts to pay prevailing wages. But G & G has not yet made any such showing and thus has not yet cleared that hurdle. Thus, the subcontractor does not have a "property interest" in the immediate payment of the contested amount, or a due process claim based on the State's refusal to make an immediate payment of that amount—any more than the *Sullivan* employees had a property interest in the withheld insurance payments at issue in that case so long as there was a dispute over whether their medical treatments were "reasonable and necessary." *See Sullivan*, 526 U.S. at 60-61.

B. When this case returned to the Ninth Circuit, following this Court's remand "for further consideration in light of . . . *Sullivan*," *Bradshaw*, 526 U.S. at 1061, the court of appeals shifted the locus of G & G's property interest in an attempt to bring its ruling for G & G into line with *Sullivan*. But the Ninth Circuit's second due process analysis is as unsound as its first.

With respect to the question "whether the claimant has a property interest in the matter complained of," the Ninth Circuit acknowledged that this Court "found that the *Sullivan* plaintiffs did not possess a property interest in the *immediate*, unconditional payment for all medical treatment under the Pennsylvania statute," while adding that the Court "went out of its way to make clear that its holding did not upset previous Supreme Court precedent supporting the conclusion that the plaintiffs had a property interest in their *claims* for payment." Pet. App. 4-5 (emphasis in original). In this regard, the court of appeals further observed that "Justice Ginsburg, who provided the fifth vote necessary to make the due process discussion in *Sullivan* an opinion of the Court, further clarified this distinction" between "a property interest in the *immediate*, unconditional payment" and "a property interest in the[] *claims* for payment." *Id.* (emphasis in original).

Having thus analyzed this Court's decision in *Sullivan*, the Ninth Circuit stated that it was "adopt[ing] the approach explicitly preserved by the *Sullivan* majority and unequivocally adopted in Justice Ginsburg's concurrence." Pet. App. 5-6. The court of appeals then concluded that "G & G's due process rights were violated, . . . not because it was denied immediate payment, but because the California statutory scheme afforded no hearing at all when state officials directed that payments be withheld." *Id.* at 6.

In terms of this Court's precedents, the Ninth Circuit's due process analysis shifted from its pre-*Sullivan* reliance on cases such as *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and *Goldberg v. Kelly*, 397 U.S. 254 (1970)—where the issue was the temporary deprivation of funds in which the individual had a vested entitlement—to *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982)—where the issue was the complete destruction of a *legal claim*. *Compare* Pet. App. 29-30 (relying on *Goldberg* and *Sniadach*) *with id.* at 5 (relying on *Logan*).

The theory of *Logan v. Zimmerman Brush Co.*, is that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause," 455 U.S. at 428, and that "the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement," *id.* at 434. In *Logan*, the claim of a complainant under the Illinois Fair Employment Practices Act was "terminat[ed] . . . because of the [Illinois Fair Employment] Commission's failure to convene a timely conference" as required by the state statute. *Id.* at 426. The complainant's "property interest . . . [wa]s destroyed when [his] case [wa]s terminated," *id.* at 434 n. 8, because he could not "obtain judicial review of the Commission action," *id.* at 434, and was relegated by the state law to the "lengthy and speculative process" of a "tort suit" that would "never make the complainant entirely whole," *id.* at 437. *See Nevada v.*

United States, 463 U.S. 110, 144 n. 16 (1983)("*Logan* . . . was a suit where the complaining party would be left without recourse.").[2]

In the instant case, California law provides G & G ample "opportunity to present [its] claim of entitlement," *Logan*, 455 U.S. at 428, to the withheld contract payments at issue. That being so, the Ninth's Circuit's invocation of *Logan* to uphold G & G's due process claim is, completely misplaced.

As an initial matter, it is clear that California's statutory scheme contemplates that the State's decision to withhold payments is open to challenge. The Labor Code expressly provides for a suit "by the contractor or his or her assignee . . . to establish his or her right to the wages or penalties withheld." Cal. Labor Code § 1733. The reference in § 1733 to a suit by an "assignee" is an obvious reference to a suit by a subcontractor to establish its right to the withheld contract payments.

Thus, G & G could have requested assignments from the general contractors and filed a § 1733 lawsuit. So far as the record shows, G & G did not make any such request and offered nothing in the way of an explanation for its failure to do so. And, G & G could have secured an express *ex ante* contractual promise by the general contractor to make such an assignment. Again, the record is silent as to whether G & G sought or secured such an express promise and if not, why not.

The Ninth Circuit bypassed this point entirely by posing the purely hypothetical situation in which the State withholds

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[2] It is not altogether clear that a contract claim of the sort held by G & G constitutes a property interest for purposes of due process analysis. *See Lyng v. Payne*, 476 U.S. 926, 942 (1986). We nonetheless proceed on the assumption that G & G's claims do constitute a property interest that cannot be extinguished without due process, and demonstrate in text, that G & G's claims for payments under its subcontracts have *not* been extinguished.

contract payments from a general contractor, the general contractor withholds payments from a subcontractor, and the general contractor then refuses the subcontractor's after-the-fact request for an assignment, thereby, as the court of appeals put it, leaving the subcontractor "holding a quite empty bag." Pet. App. 28. Contrary to the court of appeals' hypothesis, California law does not leave this hypothetical subcontractor without legal recourse.[3]

First of all, under California law there is in every contract "an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." *Bleecher v. Conte*, 29 Cal.3d 345, 698 P.2d 1154, 1156 (Cal. 1981); *California Lettuce Growers v. Union Sugar Co.*, 45 Cal.2d 474, 289 P.2d 785 (Cal. 1955). In the absence of an express *ex ante* contractual promise to provide an assignment, then, a general contractor could not arbitrarily refuse a subcontractor's request: "Where a contract confers on one party a discretionary power affecting the rights of another, *a duty is imposed* to exercise that discretion in good faith and in accordance with fair dealing." *Kendall v Ernest Pestana, Inc.*, 40 Cal.3d 488, 709 P.2d 837, 845 (Cal. 1985) (emphasis supplied).

Even on the attenuated and unwarranted assumption that a general contractor would breach that contract duty, well-established principles of California equity law would assure the subcontractor the right to bring its claim for withheld contract payments, as Judge Kozinski pointed out in dissent:

> If the contractor refuses to assign its right to sue for the money withheld to the subcontractor, the subcontractor

[3] The Ninth Circuit did *not* hold, in its pre-*Sullivan* opinion, that *no* state law remedies existed for its hypothetical subcontractor; the majority instead expressed "doubt" about the "viability" of such remedies. Pet. App. 36-37 n. 9. This state law issue was not revisited in the majority's post-*Sullivan* reinstatement order.

> could sue under the theory of equitable subrogation, which the California Supreme Court has held "is broad enough to include every instance in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter." *Caito v. United California Bank*, 20 Cal.3d 694, 704 (1978) (quoting *Rhine v. Kemmerrer*, 114 Cal.App.2d 810, 814 (1952)) . [Pet. App. 50.]

See also United States v. California, 507 U.S. 746 (1993) (state imposed a tax on a federal contractor; contractor sought indemnification from the United States; having indemnified the contractor, the United States was, pursuant to California law, subrogated to the contractor's claims against the State for a refund).

Indeed, in *J & K Painting Co. v. Bradshaw*, 45 Cal.App.4th 1394, 53 Cal.Rptr.2d 496 (1996), the state court of appeal allowed a public works subcontractor challenging the calculation of the penalty amount figured into a withheld payment to proceed directly against the State by filing a petition for a writ of mandate.

The sum of the matter is that California, far from destroying a subcontractor's claim for withheld contract payments, provides the subcontractor an ample "opportunity to present [its] claim of entitlement." The salient point here is that G & G *never* took any action at all to make, much less perfect, its claim.

While the foregoing is more than sufficient to demonstrate that the Ninth Circuit's "empty bag" hypothetical rests on an erroneous account of present California law, we would be derelict if we failed to add that the California Legislature recently acted to add express language in the prevailing wage law stating that public works contractors and subcontractors each have an equal, independent—and legally proper—opportunity to present and perfect a claim for withheld

contract payments. An amendment to the prevailing wage law, operative on July 1, 2001, grants general contractors and subcontractors alike the right to a prompt administrative hearing to contest the State's withholding of contract payments and/or the amount of the wages and penalties withheld and the right to judicial review of the administrative determination. *See* Cal. Stats. 2000, ch. 954 (A.B. 1646), reprinted in West's California Legislative Service 5320-29 (2000). Upon a decision to withhold payment, the amended law requires the awarding body or the Labor Standards Division to serve written notice on the "contractor and the subcontractor" to "advise [them] of the procedure for obtaining review." Stats. 2000, ch. 954 §§ 9, 16.[4]

C. On the foregoing analysis of G & G's due process claim, the state action question that divided the Ninth Circuit—*viz.* whether the general contractors were engaged in "state action" when they withheld a portion of the contract payments from G & G—drops entirely out of the case. It is the State that is alleged to have destroyed G & G's legal claims for full contract payment and only the State that could conceivably do so. Action that destroys a legal claim is, by definition, "state action" for purposes of due process analysis. And, G & G's "destruction of a legal claim" due process theory fails not for a lack of "state action" but because the State has not, in fact, destroyed the claim.

To be sure, the state action question debated in the court of appeals was relevant under the analysis of the *first* Ninth Circuit decision here, which identified G & G's property interest as an interest in receiving *immediate payment* under

[4] This amendment to the California statute brings the State's procedures into line with the federal procedures. Where the federal government withholds payment from contractors who have failed to comply with the federal prevailing wage requirements, both general contractors and subcontractors have the right to an administrative hearing to establish their right to the withheld funds. *See* 29 C.F.R. §5.11.

the contract. This was so, because it was only the private party with which G & G contracted that was withholding payment from G & G. While we agree with Judge Kozinski that the decision of a private contractor to refuse to pay the disputed portion of an amount otherwise due under a contract with a private subcontractor generally does not constitute state action, we do not believe that this question survives the shift in analysis by the court of appeals majority.

CONCLUSION

The judgment of the courts below should be reversed.

Respectfully submitted,

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No. 00-152

In The

Supreme Court of the United States

ARTHUR S. LUJAN, an individual, in his official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California

Petitioners,

v.

G & G FIRE SPRINKLERS, INC.,

Respondent

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On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO MOTION BY PETITIONERS FOR ORDER DISREGARDING [ALLEGED] IRRELEVANT AND IMMATERIAL MATTER, AND [ALLEGED] MATTERS OUTSIDE THE CERTIFIED RECORD IN RESPONDENT'S BRIEF AND FOR ORDER STRIKING RESPONDENT'S LODGING

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ORIGINAL

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent submits that the motion by Petitioners is without merit. Accordingly, the motion should be denied.

I

PETITIONERS' VAGUE AND UNSUPPORTED CONTENTION THAT THERE ARE MATTERS SET FORTH IN RESPONDENT'S BRIEF WHICH ARE IRRELEVANT, IMMATERIAL, OR OUTSIDE THE RECORD, IS WITHOUT MERIT

DLSE asserts in its motion vaguely, and without any specificity, that there is reference to Notices to Withhold in Respondent's Brief at pages 2 through 6 which are not included in the Joint Appendix ("*Jt. App.*"). The assertion by DLSE is vague and unspecified, because it is not true. All of the facts described regarding the Notices to Withhold in Respondent's Brief are derived from the documents included in the Joint Appendix. All of the documents and facts were before the District Court, and Court of Appeals. Unlike DLSE, G&G's brief sets forth an accurate recitation of the facts contained in the record. G&G's brief includes citations to the Joint Appendix for each fact set forth therein.

There are no citations to the Joint Appendix for the facts set forth in DLSE's brief, because there is no evidence in the record to support the statement of facts by DLSE. *See, Petitioner's Brief*, at pp. 2-5. DLSE states, without any citation to law or the record that prime contractors are required to agree to a contractual provision that money can be withheld to cover unpaid wages and penalties. *Petitioner's Brief* at p. 4. DLSE fails to cite any law or fact for its statement, because none exists. DLSE cites Labor Code §1772 on page 3 of the brief. The statute merely states that employees of the prime contractor, and subcontractors, are deemed to be employed on the public works project. DLSE incorrectly states that DLSE issued Notices to Withhold after discovering that G&G failed to pay prevailing wages on the three projects. DLSE fails to cite any facts in the record. DLSE's statement is incorrect in several respects. As set forth in G&G's brief, DLSE's own notice of penalty

assessment shows that the seizure order which triggered the re-filing of this lawsuit did not assert any failure to pay wages. DLSE asserted that G&G had failed to provide payroll records to DLSE, but DLSE was unwilling and unable to establish that it ever requested the records before assessing the penalties. DLSE states that G&G did not either obtain an assignment of prime contractor's right to sue under Labor Code §§1730-1733, or assert a right of equitable subrogation, or pursue other state law remedies. Once again, DLSE's statement is unsupported by any citation to the record of this case. No citation is provided, because none exist. The purported facts were not material, because neither a prime contractor, nor a subcontractor, has the right to a hearing.

G&G believed that it was important to set forth an accurate statement of the facts, based on the record, because of DLSE's continual effort to evade, confuse, and distort the facts and record in this case.

As explained further below, there are only two facts set forth in the brief that were not before the District Court and Court of Appeals. The two facts are (1) DLSE's recent assertion of prosecutorial immunity for issuing the Notice to Withhold [a fact which did not exist until a couple of months ago]; and (2) the fact that the recent revision to the statutes challenged in this case was a result of this action [a fact which was not known until DLSE revealed, for the first time, in its opening brief that new statutes had been adopted]. The aforesaid facts are discussed further in Part II below regarding the material lodged by G&G.

II

DLSE'S COMPLAINT ABOUT THE DOCUMENTS LODGED BY RESPONDENT IS WITHOUT MERIT

G&G lodged three items with the Court: (1) a court order and brief by DLSE showing that DLSE recently asserted prosecutorial immunity for issuing Notices to Withhold; (2) legislative history for the statutory changes adopted by the legislature; and (3) the settlement agreement between G&G and DLSE which was filed with the District Court. The lodging of these documents

was appropriate for the following reasons.

The ruling by the California State Court that DLSE has prosecutorial immunity for issuing Notices to Withhold was issued on December 4, 2000. The ruling was issued on a motion for summary judgment by DLSE in a state court lawsuit wherein G&G was represented by counsel not involved in this case. G&G's counsel in this action was not aware of DLSE's assertion of prosecutorial immunity, or the ruling thereon, until after December 4, 2000. G&G believed that notifying the Court of DLSE's assertion of prosecutorial immunity was relevant and appropriate, because it is fundamentally inconsistent with the position asserted by DLSE in its opening brief. G&G believes that the Court should be aware that, while DLSE argues to this Court that its conduct is contractual in nature, it argues in other courts that it is prosecutorial in nature. G&G believes that bringing this fact to the attention of the Court is particularly important, given DLSE's ongoing practice of taking inconsistent positions in this case. For example, DLSE asserts in its opening brief that "The DLSE has continued to take the position in this litigation that equitable subrogation permits the subcontractor to stand in the shoes of the prime contractor and obtain a full and fair hearing under §§1730-1733 of the California Labor Code." *Petitioner's Brief* at p. 36. DLSE's brief seeks to create the impression that it has asserted throughout this litigation that a subcontractor has such a direct right of action. To the contrary, DLSE asserted precisely the opposite in the District Court and Court of Appeals. *Jt. App.* 98; *Appellee's Opening Brief in Court of Appeals*, filed on or about February 20, 1991, p. 13. DLSE's contention that a subcontractor has a direct right of action is a complete reversal of the prior position it asserted in this case. Similarly, DLSE asserts without citation to any facts, or authority, that the conduct which is the subject of this lawsuit is contractual in nature. However, DLSE argued exactly the opposite to the California Supreme Court in the case of *Lusardi v. Aubry* 1 Cal.4th 976, 4 Cal.Rptr.2d 837 (1992). DLSE contends in its brief to this Court that its actions are proprietary in nature, although it asserted exactly the opposite in the case of *Department of Industrial Relations v. Fidelity Roofs* 64 Cal.App.4th 411, 420; 70 Cal.Rptr.2d 465

(1977) ["DLSE asserted that it ' is the enforcing entity of the prevailing wage statute and . . . is not a participant in the various public works projects.'"] After having acknowledged for four years that this case was a challenge to the action of DLSE, DLSE asserted a lack of state action for the first time, four years after the action was filed. The issue was not raised until after this Court remanded the case to be reconsidered in light of *American Manufacturers v. Sullivan* 526 U.S. 40 (1999). G&G never had the opportunity to brief the issue in the Court of Appeals, as it was raised for the first time subsequent to G&G's briefs being filed. G&G submits that the issue was waived.

G&G disagrees with DLSE's contention that it should be allowed to assert inconsistent positions in different courts.

The lodging of the legislative history for the recent statutory changes adopted by the California legislature was appropriate because DLSE concealed the statutory changes from G&G, and this Court, until the filing of its opening brief. The statutory changes had been adopted prior to the granting of the Petition for Writ of Certiorari, and were pending when the Petition for Writ of Certiorari was filed. Nevertheless, DLSE failed to notify either this Court, or G&G, of the pending statutory changes. G&G was not aware that the statutes which were the subject of this lawsuit had been modified by the legislature until receiving DLSE's opening brief. Concurrent therewith, the United States filed a brief suggesting that the Court vacate the judgment in favor of G&G, on the basis of the statutory changes. *See, e.g., Superintendent v. Hill* 472 U.S. 445, 461 (1985) (Stevens, J. concurring and dissenting) ["It is not unreasonable to expect a state's highest legal officer to know the state's law and to bring to this court's attention the rules of state law that might affect the sound exercise of our discretion to grant certiorari . . ."]. It is conceivable that the Petition for Writ of Certiorari would have been denied, if DLSE had disclosed the statutory changes.

The time frame for filing briefs in this case was relatively short, with oral argument shortly thereafter. DLSE's concealment of the statutory changes forced G&G to research and address, both factually and legally, an issue that had not previously existed in the case. G&G submits that lodging

the legislative history with the Court was appropriate and proper, under the circumstances.

The third item included in the lodging was a copy of the settlement agreement between DLSE and G&G. The settlement agreement was before the District Court, and Court of Appeals. The settlement agreement was relevant merely to allow the Court to understand the factual circumstances under which this case arose. As explained in G&G's brief, this case was filed initially, dismissed without prejudice, and then re-filed. The motion for summary judgment which was granted in this case included a request for judicial notice, specifically requesting the District Court to take judicial notice of the documents on file in the previous lawsuit. *Jt. App.* at 174-175. The motion for summary judgment, which is included in the joint appendix, sets for the facts of the prior settlement agreement. However, the actual settlement agreement was not included in the joint appendix, and so it was included in the lodging.

The Court of Appeals considered the appeal of the attorney fee award in favor of G&G. The District Court found that G&G was entitled to recover attorneys fees for both the present action, and the prior action, which was dismissed without prejudice. The Court of Appeals affirmed the award of attorneys fees in this regard. The Court of Appeals was fully aware of the facts relating to the prior lawsuit, in connection with its consideration of the attorney fee issue. However, the attorney fee issue is not the subject of this Court's Writ of Certiorari. G&G believes that it was appropriate to include the settlement agreement with the documents lodged with the Court. As explained above, the settlement agreement is a part of the record that was before the District Court when the motion for summary judgment was heard. Obviously, the District Court was fully aware of the settlement agreement, having previously dismissed the case without prejudice in connection therewith.

III

CONCLUSION

During the five and a half years of this lawsuit, G&G has been required to contend with constant and repeated efforts by DLSE to confuse and evade the issues raised by this case. G&G

submits that DLSE's motion is another such effort. DLSE attempts to confuse the Court, and distort the record, by asserting, without any basis, that G&G's statement of facts regarding the Notices to Withhold is not based on the record in this case. G&G's statement of facts is based on the record before this Court, and meticulously cites the record. DLSE's statement of facts is untrue, and does not include any citations to the record. G&G's lodging of documents would not have been necessary if DLSE had informed the Court that it contended, in other courts, that its conduct was prosecutorial in nature; and had not concealed from G&G, and the Court, statutory changes scheduled to go into effect in July, 2001. It is respectfully submitted that DLSE's motion should be denied.

DATED: February 7, 2001

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

Case No. **00-152**
Lujan, et al. v. G&G

I, the undersigned declare: my business address is 12424 Wilshire Boulevard, Suite 1450, Los Angeles, California 90025-1048.

I am over the age of eighteen years, not a party of the above-entitled action, and at the time of mailing, was employed ore resided in the County where said mailing occurred.

On February 7, 2001, I served the **OPPOSITION TO MOTION BY PETITIONERS FOR ORDER DISREGARDING [ALLEGED] IRRELEVANT AND IMMATERIAL MATTER, AND [ALLEGED] MATTERS OUTSIDE THE CERTIFIED RECORD IN RESPONDENT'S BRIEF AND FOR ORDER STRIKING RESPONDENT'S LODGING**, re Lujan, et al. v. G&G, by depositing a copy thereof, enclosed in a separate, sealed envelope, with the postage thereon fully prepaid, in the United States mail at Los Angeles, County of Los Angeles, California, which envelope was addressed as follows:

Thomas S. Kerrigan, Esq.
Thomas R. Fredericks, Esq.
DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
Attorneys for Petitioners
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Van Nuys, CA 91401
(818) 901-5482

Executed on February 7, 2001, at 12424 Wilshire Boulevard, Suite #1450, Los Angeles, California 90025-1048.

I declare under penalty of perjury that the foregoing is true and correct.

Judith V. Swanson
JUDITH V. SWANSON